

Oglesby

4200

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

CHARLES KUEPER,

Plaintiff,

vs.

No. 91-L-734

R.J. REYNOLDS TOBACCO COMPANY,
THE TOBACCO INSTITUTE, INC., and
REESE DRUGS, INC.,

Defendants.

REPORT OF PROCEEDINGS

December 15, 1992

Before the HONORABLE JAMES K. DONOVAN, Circuit Judge

APPEARANCES:

MR. BRUCE N. COOK, Attorney at Law,
On behalf of the Plaintiff;

MR. RICHARD E. BOYLE, MR. PAUL G. CRIST &
MR. RICHARD G. STUHAN,
Attorneys at Law,
On behalf of Defendant R.J. Reynolds Tobacco Company;

MR. LARRY HEPLER, MR. JAMES GOOLD, and
MR. THEODORE J. MacDONALD, Attorneys at Law,
On behalf of Defendant Tobacco Institute; and

MR. MICHAEL J. NESTER, Attorney at Law,
On behalf of Defendant Reese Drugs, Inc.

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1 second?

2 (A discussion was had off the record and outside the hearing
3 of the jury.)

4 THE COURT: Everybody is going to stay right in
5 their seats. I am going to work right here and we will take a
6 two minute break for the parties to consult for a second.
7 (Following a discussion among defense counsel off the record,
8 the following proceedings were reported in open court.)

9 THE COURT: We ready to proceed? Mr. MacDonald, do
10 you wish to proceed with this witness?

11 MR. MACDONALD: We have no questions, Your Honor.

12 THE COURT: Thank you, Mr. MacDonald, and who would
13 speak on behalf of Reynolds?

14 MR. STUHAN: I will, Your Honor. We have no
15 questions.

16 THE COURT: And on behalf of Reese?

17 MR. NESTER: No questions, Your Honor.

18 THE COURT: Mr. Lewis, thank you. Please watch
19 your step getting down, if you would.

20 MR. COOK: Your Honor, we have to take a short
21 break to secure the presence of a witness. That will take 10
22 to 15 minutes probably.

23 THE COURT: Who is the next witness?

24 MR. COOK: Marion Oglesby.

1 THE COURT: We will take as brief a break as we
2 possibly can and get started with a new witness
3 (Following a recess, the following proceedings were reported
4 in open court.)

5 THE COURT: Mr. Cook, who did you indicate you were
6 calling next?

7 MR. COOK: Marion Oglesby.

8 THE COURT: Would the witness please come forward,
9 sir. Raise your right hand.

10
11
12
13
14 MARION BROWN OGLESBY, JR.
15 (being called as a witness by the Plaintiff, upon being duly
16 sworn, testified as follows)

17 THE COURT: Please take the witness stand, if you
18 would.

19 EXAMINATION BY MR. COOK:

20 Q. Would you state your name and address, sir.

21 A. Marion Brown Oglesby, Jr., [DELETED]
22

23 Q. Mr. Oglesby, by whom are you employed?

24 A. RJR Nabisco.

1 Q. And what is your current status with them, sir?

2 A. I am a Senior Vice President with RJR Nabisco,
3 President of RJR Nabisco Washington, and Executive Vice
4 President with RJR Tobacco Company.

5 Q. Mr. Oglesby, with respect to RJR Nabisco, you are a
6 Senior Vice President. What are your duties at RJR Nabisco?

7 A. Senior Vice President for Government Relations, my
8 title.

9 Q. And you are the President of RJR Washington?

10 A. Right, it's a -- the Washington office is a kind of
11 a service entity for the rest of the corporation. It is a
12 separately owned Delaware Corporation in Washington.

13 Q. And you are an Executive Vice President with RJR
14 Tobacco?

15 A. I have that title, yes, sir.

16 Q. Would you be involved in governmental relations for
17 RJR Tobacco also?

18 A. Yes, sir.

19 Q. Your function overlaps between the three
20 corporations?

21 A. Correct.

22 Q. You were raised in Illinois.

23 A. Yes, sir.

24 Q. In Flora?

1 A. Flora.

2 Q. Which is about what -- 60-70 miles east of here?

3 A. Hour and 45 minutes in bad weather.

4 Q. And attend high school there?

5 A. Yes, sir.

6 Q. And I believe you attended the University of

7 Illinois for several years.

8 A. For a short time, yes, sir.

9 Q. You don't have a college degree.

10 A. No, sir.

11 Q. Then you went to work for Illinois Bell?

12 A. For Illinois Bell. Started in Centralia. Was
13 hired in Alton. Started in Centralia and worked in Peoria,
14 Rock Island, Moline, Springfield, and back -- I was manager
15 for Illinois Bell in Alton.

16 Q. Are you familiar with Cahokia, Illinois?

17 A. Yes, sir.

18 Q. Are you familiar with the Huck's store on the
19 southwest corner of Range and Jerome Lane?

20 A. The what store?

21 Q. Huck, H-U-C-K -- 711 type thing?

22 A. No, sir.

23 Q. It is near -- it is on the-- well, how many --
24 let's see, Mr. Oglesby, I believe you are 49 or 50 years old?

1 A. 50.

2 Q. Happy birthday.

3 A. Thank you, sir.

4 Q. And after -- how long did you work for Illinois
5 Bell?

6 A. About four-and-a-half years.

7 Q. What period of time does that take us to, sir?

8 A. Takes us to January of 1967.

9 Q. And then in January of 1967, what did you do next?

10 A. I went to Springfield, Illinois, as the principal
11 assistant to the Speaker of the House of the Illinois General
12 Assembly.

13 Q. Was that gentleman Ralph Smith?

14 A. Ralph Smith, yes, sir.

15 Q. And Mr. Smith later became a United States Senator?

16 A. He was United States Senator for a short time.

17 Q. And he got beat in the primary election?

18 A. No, Adlai Stevenson beat him in 1970.

19 Q. Did you stick with him in the United States Senate?

20 A. No, I stayed in Springfield.

21 Q. When he went -- what year did he go to the United
22 States Senate?

23 A. I guess that would have been in '70 -- early --
24 must have been in '69. Late '69, early '70.

1 Q. What did you do then in Illinois when you left?

2 A. I worked for Governor Ogilvie and then the
3 Secretary of State's office.

4 Q. Which Secretary of State?

5 A. John Lewis.

6 Q. And then eventually you got to Washington?

7 A. Yes, sir.

8 Q. I believe you came with Secretary Madigan.

9 A. He was a congressman from Illinois, and I went to
10 Washington in 1973 to work for him.

11 Q. He currently is the Secretary of Agriculture for
12 the United States.

13 A. Yes, sir, that is correct.

14 Q. What did you do for -- had Congressman Madigan
15 served as -- not a stretch -- got the wrong profession -- had
16 he served for a period of time in the Illinois legislature?

17 A. Yes. He was -- let's see, I guess he served three
18 or four terms in the Illinois General Assembly.

19 Q. When you went to Washington, was your capacity with
20 him administrative assistant?

21 A. Executive assistant. Administrative assistant, I
22 think, was the exact title.

23 MR. HEPLER: Your Honor, I am having a little
24 trouble hearing the witness.

1 THE COURT: Do you need a drink of water?

2 THE WITNESS: That might help.

3 THE COURT: There should be some in there. If not,
4 we will get you some. Please continue.

5 Q. How many years did you work then for Congressman
6 Madigan?

7 A. About three-and-a-half years.

8 Q. If I recall correctly, he was from up around
9 Champaign.

10 A. Correct. Lincoln, Illinois, was his home.

11 Q. And he was on -- before he became Secretary of
12 Agriculture, he was on the Agriculture Committee.

13 A. He was on the Ag Committee; that is correct.

14 Q. Was that his principal committee assignment when
15 you worked for him?

16 A. When he first went to Congress, I am not sure what
17 his first committee assignment was, but he was on the Ag
18 Committee in his first term. Second term I believe he got on
19 the Energy and Commerce Committee.

20 Q. When you were working for him as executive -- as
21 his executive assistant -- did you get involved in the
22 tobacco issues as they involved the Ag Committee?

23 A. Not that I recall, sir.

24 Q. After your tour was completed with Secretary

1 Madigan, or Congressman Madigan would be more appropriate --
2 that period of time -- what did you do next?

3 A. I was involved in President Ford's campaign in '75
4 and '76.

5 Q. Now, did you work for the campaign or --

6 A. I worked for the campaign.

7 Q. Then he got beat?

8 A. Yes, sir.

9 Q. What did you do next?

10 A. I went to work for the State of Illinois in the
11 Washington office.

12 Q. And that would have been for Governor Thompson?

13 A. Yes, sir.

14 Q. How long did you do that? Until Jimmy Carter got
15 beat?

16 A. No. No, I did that for basically two years and
17 then I was -- went to work for the Energy and Commerce
18 Committee In the House of Representatives.

19 Q. For the minority staff?

20 A. Yes, sir.

21 Q. Who was the minority chairman?

22 A. The two ranking Republicans were Jim Broyhill, and
23 Ed Madigan was the ranking on the subcommittee that I worked
24 with.

1 Q. Does the Energy and Commerce Committee have
2 anything to do with tobacco?

3 A. Yes, sir.

4 Q. Because it is commerce?

5 A. Well, it has jurisdiction over some of the issues
6 that related to the tobacco industry, yes, sir.

7 Q. Which issues would Energy and Commerce have
8 jurisdiction over?

9 A. Energy and Commerce Committee probably has the
10 broadest range. I mean, all forms of commerce. They deal
11 with railroads. They deal with the environmental issues,
12 telecommunications, securities industry, New York Stock
13 Exchange-type issues. They have a wide range of
14 jurisdiction.

15 Q. Did you ever get involved in whether or not there
16 was any polonium involved in insecticides used on tobacco?
17 Do you recall that?

18 A. I am sorry, Mr. Cook, I don't--

19 Q. Polonium. Radon is a polonium.

20 A. I am not aware of that. Was never involved in
21 that.

22 Q. Were you involved with price supports or things
23 like that?

24 A. No. I worked on the Energy and Commerce Committee.

1 My subcommittee that I worked with had nothing to do with the
2 -- there was a different subcommittee that dealt with those
3 issues.

4 Q. So then up to, I guess, 1980, you hadn't had too
5 much to do with tobacco as a subject.

6 A. Correct.

7 Q. And then after your period of time on the Energy
8 and Commerce Committee, what did you do next, sir?

9 A. I joined the Reagan White House and worked in
10 legislative affairs in the Reagan White House.

11 Q. What is legislative affairs?

12 A. Well --

13 Q. Sounds interesting.

14 A. Right. That is the -- in all White Houses they
15 have a group of people that are the people that interact and
16 coordinate with the members of Congress and the Congress for
17 the administration, and I dealt with the House side and then
18 with the entire Congress.

19 Q. And how many years did you work then in the Reagan
20 White House?

21 A. The first stint was about six plus years -- six and
22 a quarter years. I went back then for the last year for the
23 last nine months.

24 Q. You know the President of the United States

1 personally, don't you?

2 A. Yes, sir.

3 Q. George Bush.

4 A. Yes, sir.

5 Q. Did you ever during this period of time ever meet
6 his Chief of Staff when he was Vice President?

7 A. I am sorry. He had several Chiefs of Staff.

8 Q. Craig Fuller.

9 A. Yes. I met Craig Fuller.

10 Q. Craig Fuller now is an Executive Vice President for
11 Phillip Morris, is he not?

12 A. I don't know the title, but yes, he works for
13 Phillip Morris.

14 Q. And he was in charge of the last Republican
15 National -- the nominating convention?

16 A. He had a role. I don't know what the title was --
17 convention manager -- but yes, he was involved in the last
18 convention.

19 Q. In the short -- you were out of the White House
20 then for a period of time and then went back in?

21 A. That's correct.

22 Q. What did you do when you were out of the White
23 House?

24 A. I was with a small lobbying firm, consulting firm.

1 Q. That -- Mr. Heck, was he in that firm?

2 A. Yes. Correct. Mr. Heck, Mr. Spencer.

3 Q. And then when Mr. Sununu left, you came back in?

4 A. No. When Howard Baker left, I came back into the
5 White House as Deputy Chief of Staff.

6 Q. Do you know Mr. Griscom?

7 A. Yes, sir.

8 Q. And he was Howard Baker's administrative assistant?

9 A. I knew Mr. Griscom when he worked for Senator Baker
10 on the Senate side so I knew him, yes, sir.

11 Q. Mr. Baker was Chief of Staff in the Reagan White
12 House, was he not?

13 A. Yes, sir.

14 Q. Sununu was with Bush. I am sorry. We have Reagan
15 and Reegan in that period of time, and when Reegan left,
16 Baker came in.

17 A. That's correct.

18 Q. What does the Chief of Staff in the White House do?

19 A. Well, the Chief of Staff's job varies depending
20 upon who you are working for and what they expect you to do.
21 In the Reagan White House, the Chief of Staff was as the name
22 implies -- helped run the place. He was the focal point for
23 in the funnel for information to the President. He obviously
24 directed the rest of the staff with and on behalf of the

1 President. The job changes depending upon the person and
2 depending upon the construct of the rest of the staff.

3 Q. It is whatever the President wants it to be.

4 A. That's the best way to put it, is whatever the
5 President wants it to be.

6 Q. In the year-and-a-half that you left and you worked
7 for the public relation firm. Did that public relation firm
8 --

9 A. It is a consulting firm, but a lobbying firm.

10 Q. A lobbying firm.

11 A. That is right.

12 Q. Was one of the people that you work for the Tobacco
13 Institute, or the tobacco industry?

14 A. One of the clients that the company had before I
15 joined it was Brown and Williamson Tobacco Company, yes, sir.

16 Q. And at that point in time, did you get involved in
17 tobacco?

18 A. Somewhat, yes, sir.

19 Q. And then you went back in the White House as Deputy
20 Chief of Staff yourself.

21 A. That's correct.

22 Q. And that would have been until?

23 A. Until January.

24 Q. Until the end of the Reagan term.

1 A. Correct.

2 Q. And then -- oh, Mr. Griscom who had been related to
3 Mr. Baker who was Chief of Staff?

4 A. Right.

5 Q. Mr. Griscom is also a Vice President at RJR
6 Tobacco?

7 A. He works for the tobacco company; that is correct.

8 Q. He is Vice President.

9 A. I believe the title is Executive Vice President,
10 but I am ...

11 Q. Then following, did you leave the White House with
12 President Reagan, or did you stay for a portion of the Bush
13 term?

14 A. No, I left at the end of January 20th, 1989.

15 Q. Did you have a cordial relationship with President
16 Bush?

17 A. I believe so.

18 Q. You just went somewhere else.

19 A. I think that is the natural -- basically all of the
20 people in senior positions change when any administration
21 changes, and I think that is the natural thing. We expected
22 that.

23 Q. What did you do next then, Mr. Oglesby?

24 A. I started the process of looking for work and

1 interviewed with a lot of different people. Went to work for
2 RJR Nabisco in April of 1989.

3 Q. And as Executive Vice President in charge of
4 governmental relations -- well, maybe I better do one more
5 thing. In addition to your duties at RJR N., you were also
6 on the Executive Committee of the Tobacco Institute, are you
7 not?

8 A. That is correct.

9 MR. COOK: Your Honor, I propose to call
10 Mr. Oglesby under Section 2-1102 as an officer or director of
11 both RJR and the Tobacco Institute.

12 THE COURT: Does Reynolds wish to make a comment on
13 the request?

14 MR. CRIST: Your Honor, he has already testified
15 that he has served in both capacities. On the other hand, I
16 think he has also testified he had no connection before April
17 of '89. So I think that sort of limits the scope of what can
18 appropriately be asked of this witness on either topic.

19 THE COURT: Any comment by the Tobacco Institute?

20 MR. HEPLER: No, Your Honor, I would join in that.
21 Yes, he is on our executive board since -- I don't know what
22 the date is exactly. So I think that effectively limits that
23 scope.

24 THE COURT: Well, I think with regards to the

1 section cited by Mr. Cook, the important fact that he holds
2 the position now when he is on the stand, and that qualifies
3 him to be treated under this section, allows you to go into
4 cross-examination. With regards to the scope of that, we
5 will take that up as the questioning proceeds. Continue.

6 MR. COOK: Thank you, sir.

7 CROSS EXAMINATION BY MR. COOK:

8 Q. Mr. Oglesby, how many -- with respect to the
9 executive committee of the Tobacco Institute -- how many
10 people serve on that committee with you, if you recall, sir?
11 I know that you are principally interested in your own
12 company and not the others, but --

13 A. I guess five other people. Two people from Phillip
14 Morris.

15 Q. We have met Mr. Campbell. Nice gentleman.

16 A. Two people from Phillip Morris, two people from
17 Lorillard, and two people from RJR. So Jim Johnston and
18 myself.

19 Q. What about Liggett?

20 A. I don't know that they have a formal position on
21 the executive committee. I think they attend meetings, but I
22 am not sure that they are formal members.

23 Q. What is your understanding of the role of the
24 executive committee, sir?

1 A. The executive committee sets broad parameters in
2 terms of budget in general direction for the Institute.

3 Q. You are on there with Mr. Johnston, who the jury
4 has also met -- President of RJR. Is he your corporate
5 superior, or your corporate equal, or is he -- is it kind of
6 hard to tell?

7 A. Well, my role in terms of jobs kind of evolved. I
8 had a dotted line relationship to the tobacco company with
9 Mr. Johnston, but on tobacco matters, he certainly speaks for
10 the tobacco company.

11 Q. With respect to Oreo cookies --

12 A. With respect to Oreo cookies --

13 Q. He is Executive Vice President of Nabisco also?

14 A. No, his only title, I believe, is with the tobacco.

15 Q. With the tobacco?

16 A. RJR in Washington works with Nabisco, with
17 Planters, Lifesavers. Works with the corporate staff. We
18 work with everybody on a broad range of corporate issues, and
19 that is my principal job.

20 Q. Who is the President of Lorillard?

21 A. Andrew Tish.

22 Q. Lorillard manufactures Newport?

23 A. That is correct, sir.

24 Q. There is also a management committee of the Tobacco

1 Institute, is there not?

2 A. There is a recently constructed management
3 committee, yes, sir.

4 Q. And the Mr. Griscom that we just were talking
5 about, he is on the management committee for RJR.

6 A. That is correct.

7 Q. With respect to tobacco issues, you don't smoke?

8 A. No, sir.

9 Q. Never have?

10 A. Not really, no, sir.

11 Q. What tobacco issues, since you have been there in
12 1989, have you been involved with?

13 MR. CRIST: Your Honor, let me object to this on
14 the basis that I think that the question calls for, certainly
15 includes protective First Amendment activities.

16 MR. COOK: Perhaps I better lead him, Judge.

17 MR. CRIST: Renew the objection and ask for
18 continuing objection.

19 THE COURT: Your objection is sustained. Your
20 continuing objection does stand. You have the option of
21 leading.

22 MR. COOK: I think it might be --

23 MR. HEPLER: Do we have to reaffirm with each
24 witness?

1 THE COURT: No. The standard -- let me make sure
2 we are understanding each other. The policy we have used
3 each day, that objection for one Defendant applies to all the
4 objections that you previously made in connection with
5 lobbying and political activities is continued throughout
6 this witness. Now, do you think that is sufficient?

7 MR. HEPLER: Yes, Your Honor.

8 THE COURT: Would you please rephrase that?

9 MR. COOK: Yes.

10 Q. (by Mr. Cook) I understand that one of the issues
11 that faces the tobacco industry right now is a challenge
12 opposed by the American Medical Association concerning
13 whether or not the tobacco industry should be able to
14 advertise their products.

15 A. Well, the issue of advertising is an issue, yes,
16 sir.

17 THE COURT: We are going to switch court reporters
18 before you start the next one.

19 * * * * *

20 (The following portion of the proceedings were
21 reported by Karen S. Landrum, #084-001870.)

22
23 (The Examination of Marion B. Oglesby by Mr. Cook is
24 continued.)

1 MR. COOK: May I continue, Judge?

2 THE COURT: Yes, if you would, please.

3 Q (By Mr. Cook) What is, to your understanding, what
4 does the word "promotion" mean when you talk about
5 cigarettes?

6 MR. CRIST: Objection, Your Honor. Preempted.

7 THE COURT: Okay. Would you approach the bench,
8 please.

9 (Side bar conference held out of the hearing
10 of the Jury.)

11 MR. COOK: I could confine the question to the
12 Tobacco Institute, if you want me to.

13 THE COURT: Then I want to make sure that I give a
14 proper limiting instruction to the Jury if that's the area.
15 How do you approach doing that? Do you have a suggestion?

16 MR. COOK: I don't have any problem with him
17 objecting to it. If he wants an instruction -- it's in the
18 place of the Tobacco Institute because of preemption after
19 '69, I assume that the general term promotion applies before
20 1969 and after 1969, and I just asked him what he understands
21 it to be.

22 THE COURT: Okay. Go ahead. You are going to
23 say --

24 MR. COOK: At this point, I've only asked him what

1 promotion means, but I do intend to ask him questions about
2 promotional activities and the -- uh -- to the extent that
3 they may or may not relate to warnings or diminution of
4 warnings, they may very well be preempted. To the extent
5 that they may involve fraud or deceit --

6 MR. CRIST: Excuse me. A Juror has left the
7 courtroom.

8 THE COURT: He just wants to get a drink of water.
9 Go ahead.

10 MR. COOK: It may involve deceit. It won't do any
11 good at this point in time -- I believe it's premature to
12 make an objection, but I don't mind an illuminating
13 instruction or the Court informing the Jury that whatever Mr.
14 Crist wants with respect to a limiting instruction, if it's
15 appropriate it be given --

16 MR. CRIST: I think he's conceded the correctness of
17 my objection, Your Honor. Therefore, I'd ask it be
18 sustained, you know, with respect to the potential
19 application to the Tobacco Institute. We spent a month or so
20 in arguments in this courtroom while Mr. Cook said their
21 liability of any advertising and promotional is entirely
22 derivative, so therefore they are to the same extent we are
23 protected by the Preemption Doctrine.

24 MR. COOK: If I said that, I mis-spoke. I don't

1 agree with that.

2 MR. HEPLER: It's all over the record as an
3 objection. I mean, it's been the ruling from --

4 MR. GOOLD: We're walking in their footprints.

5 THE COURT: They're going to be walking on ours
6 pretty soon.

7 Mr. Hepler, the ball's in your corner. Would you
8 like to make a comment, sir?

9 MR. HEPLER: The duty we have here, as Mr. Cook has
10 stated, not only before the Court, but in his reference to
11 the Supreme Court, is a presumed duty that the Tobacco
12 Institute
13 -- there can only be proffered as derivative of the tobacco
14 industry and the Court has ruled we have no independent duty
15 to warn, and going into promotions -- we're going to
16 incorporate into products -- I guess advertisements, but at
17 least promotions, assume at least product promotion is what
18 it's going in now. We have no duty to make a product. Our
19 only duty is derivative in this nature and therefore the only
20 protection they have, we have --

21 MR. COOK: This is ridiculous.

22 THE COURT: I believe Judge LeChien, at least from
23 what I can derive from the record, and I indicated yesterday
24 whether I'm right or wrong that I didn't think you were

1 covered by the preemption, but I don't feel you have a duty
2 to warn. There's no question I don't think that Mr. Crist is
3 correct with regards to promotion or advertisements after
4 1969 from my reading of this case. Whether I'm right or
5 wrong about the Tobacco Institute is an issue in the case.

6 MR. HEPLER: But it's like a back door bootstrap in
7 the sense that we don't do it, we're not doing promotions and
8 therefore he gets to go into the issue which he can't go into
9 with the tobacco industry and for which we have no obligation
10 to do and which our only obligation is derivative, so, it
11 doesn't make any sense.

12 MR. COOK: Your obligation is not only derivative,
13 it's also acting in concert and immunity applies to people
14 that act in concert that do not apply to you.

15 MR. GOOLD: The brief in behalf of Charles Kueper
16 that was submitted to the Supreme Court in the Supervisory
17 Order is highlighted.

18 MR. COOK: Does that mean I've made a ruling of law
19 on this?

20 THE COURT: I guess you've made it.

21 MR. COOK: Well, I think that that's true, but I
22 think that also since it's acting in concert is that they
23 don't get the privilege or immunity, you can't make that -- I
24 mean --

1 THE COURT: Okay. The statement is "Its liability
2 is derivative from the conduct of RJR and its relationship is
3 symbiotic," and that was contained within a document filed by
4 the Plaintiff with the Supreme Court -- "Objections of
5 Charles Kueper to the Tobacco Institute's Motion Pursuant to
6 Supreme Court Rule 383 for Supervisory Order and Motion to
7 Stay."

8 Okay. And you're just indicating that is your
9 position, but you think they're also liable on other grounds?

10 MR. COOK: Well, Your Honor, I don't think that that
11 concedes the preemption clause. They don't sell cigarettes.
12 I agree with that.

13 THE COURT: Right. They're not a manufacturer or
14 distributor.

15 MR. COOK: However, to the extent that my client is
16 sold cigarettes and it injured him, it is in fact derivative
17 because he bought them, but acting in concert and derivative
18 mean the same thing and acting in concert is, as far as I'm
19 concerned, but I don't think that I get to rule on things
20 like this. I think that's a real nice word -- "symbiotic."

21 THE COURT: I'm in a position now of trying to make
22 up a motion, a limiting instruction to the Jury which I'm
23 willing to take a shot at, after all the other things I've
24 done in this case, but I mean, and I will attempt to state it

1 as I understand it, right or wrong. Your position I think is
2 concrete, clearly in the record. I think I understand it.
3 I'm disagreeing with you. I think if it goes anywhere, and,
4 of course, it's a critical point in this case, without a
5 doubt, but I don't know what to do other than pursue the way
6 I look at the case right now. I would anticipate informing
7 the Jury that R.J. Reynolds, the cause of action against them
8 after 1969 is preempted uh --

9 MR. COOK: With respect to warnings?

10 THE COURT: With regard to warnings as it applies to
11 advertising or promotions. Now, that does not apply to other
12 areas other than advertising or promotions, but you used the
13 word "promotions." It sounds like that's where it was going.
14 Because the Tobacco Institute is not a manufacturer or a
15 retailer, I guess, of the product, I've ruled that the
16 preemption does not apply to them, but they also don't have a
17 duty to warn. Now, I would feel much more comfortable giving
18 the Jury instructions like this after all the evidence is in,
19 when I can submit it to them in writing, but I will give that
20 right now. I -- I think they will be able to follow it.

21 What are your thoughts?

22 MR. CRIST: I think there's just no question but
23 that the evidence in this area is just completely
24 inadmissible with respect to tobacco --

1 THE COURT: I agree with you.

2 MR. HEPLER: And the problem is, you're also
3 pointing out on the record -- I mean, I have no duty to warn,
4 I have no product to make and the problem is that then you
5 get into promotions or high schools or whatever he goes into,
6 something that we don't do and are not responsible for and
7 now we're being held up to a standard they're not being held
8 up to, but our duty we have is -- we're deriving their duty,
9 but we don't have their protection.

10 THE COURT: Let's not limit it to the only duty that
11 you've got is derivative, but that's the little distinction
12 that he's drawing, but you're not --

13 MR. CRIST: I think we're flipping legal theories
14 here.

15 THE COURT: That could be. That could be.

16 MR. COOK: We're also flipping reasons why I may
17 offer that for a variety of reasons.

18 THE COURT: I would like to know now whether you
19 would like for me to wait until the close of the case to
20 address this in written instruction or attempt to do this
21 now? If you wish to comment -- you're not required to.

22 MR. CRIST: I would like to have an instruction that
23 is inadmissible or can not bear upon any issue with respect
24 to tobacco --

1 MR. HEPLER: If you do that, then there will have to
2 be some more corresponding tag that we have no obligation to
3 warn.

4 THE COURT: Well, we'll do that.

5 MR. COOK: You're going to tell them that at the end
6 of the case? You shouldn't advise them what their duty is
7 now or not. I have not pleaded that they have a duty to warn
8 and I've not asked them about any warnings and I've advised
9 them

10 -- this evidence is offered against TI for purposes of
11 proving their deceit. If you're going to say something about
12 duty to warn, then you ought to say the reason that I'm
13 offering the evidence is because -- if I say it, it will
14 implicate they have no duty at all to Plaintiff, which is not
15 the case.

16 MR. GOOLD: Then we're back to the problem we had
17 yesterday.

18 MR. COOK: That's why I suggested to you fellows
19 that you draft something.

20 MR. HEPLER: Each situation you bring up is not
21 necessarily covered, so --

22 MR. COOK: But it won't be correct to tell them,
23 unless I ask the question about warning, that TI doesn't have
24 a duty to warn. Now, when I ask the question about warnings

1 in 1962, that's admissible against RJR, but it may not be
2 admissible against TI, but you also have to say is that you
3 may consider this in terms of Plaintiff's complaint, in terms
4 of his obligation over the conspiracy --

5 THE COURT: You're only offering this as to the
6 Tobacco Institute --

7 MR. COOK: Yes, sir.

8 THE COURT: And none of this that you're asking
9 applies to Reynolds?

10 MR. COOK: All I'm asking really is to say what
11 promotion is and then I'll -- I'm going to go into something
12 entirely different and everybody will understand why I'm
13 offering it. I mean, this is again --

14 MR. HEPLER: Your Honor, it's kind of a tough point
15 for us. Could we -- I don't know.

16 MR. COOK: Why is the definition of promotion --
17 that's all I've asked him.

18 MR. HEPLER: No, the point we're concerned about is
19 whether or not, if we need to have an opportunity to discuss
20 whether we want to do a limiting instruction in this area
21 because --

22 MR. COOK: Why don't we just let me ask him what
23 promotion means.

24 THE COURT: What we're going to do is, I'm going to

1 allow you to ask it. We'll see where you go. Until the
2 point we get a written limiting instruction, the extent to
3 which I will tell the Jury is if you're offering it for a
4 limited purpose as to one defendant, I'll tell them that, but
5 that I will more fully instruct them as to how to consider
6 it.

7 MR. COOK: I'm not offering it as to the -- I am
8 offering it as to the co-defendant at this point.

9 THE COURT: Well, you changed your mind.

10 MR. COOK: I changed my mind. Let me ask the
11 question.

12 THE COURT: Did you change your mind back again?

13 MR. COOK: No. Just let me ask him.

14 THE COURT: I said you can do that.

15 MR. COOK: Oh good. You'll find out where I'm
16 going.

17 (End side bar.)

18 THE COURT: Over the objection made at the bench,
19 I'm going to allow you to proceed with the question that you
20 indicated, Mr. Cook.

21 MR. COOK: Yes, sir.

22 Q (By Mr. Cook) My question, Mr. Oglesby is what is
23 promotion?

24 A A promotion can be a lot of things. You know --

1 Q In the tobacco industry?

2 A Well, you promote, you know, you have promotions
3 that are maybe things that are identified in the process of
4 marketing your product.

5 MR COOK: Could you mark these. Give these a
6 marking of about 302, 303, 304 and I'll bring you some more.

7 (Plaintiff's Exhibits 302 through 308 are
8 marked for identification.)

9 Q (By Mr. Cook) Mr. Oglesby, while they're looking at
10 the remainder of those, I'm going to hand you Plaintiff's
11 Exhibit Number 303 and ask you whether or not that is an
12 example of what you meant when you talked about promotions?

13 MR. CRIST: Object, Your Honor. Preempted.

14 THE COURT: He can answer this question. That's
15 overruled. Continue.

16 A (By Witness) I'm sorry, Mr. Cook --

17 Q Yes. Is that an example of a promotion?

18 A Well, this particular is "Buy Two, Get One Free." I
19 think it's kind of a discount. I don't know what the
20 marketing terms -- uh -- are, but it's part of marketing.

21 Q I'm trying to see if I can separate in my own mind
22 advertising, or the Jury's minds, advertising.

23 There is three practices, advertising, promotion and
24 marketing and sampling are practices in --

1 A Okay.

2 Q Now, is discount a promotional activity or is
3 discount a marketing activity or --

4 MR. CRIST: Can I have a continuing objection to
5 this line?

6 THE COURT: You may have a continuing objection.
7 It's overruled.

8 MR. HEPLER: Your Honor, I have an objection on
9 materiality and relevance. I'd like if you would make this
10 line continuing also.

11 THE COURT: It is a continuing objection. We'll see
12 where Mr. Cook is going with this line of inquiry.

13 MR. CRIST: Your Honor, I also would like to lodge
14 an objection to this. There's no foundation of this witness
15 as to any reason to know what these terms mean and what kind
16 of category they fall into.

17 THE COURT: Okay. I think there's been a sufficient
18 foundation laid to allow him to go into this area.

19 MR. COOK: Your Honor, I have removed from Plaintiff
20 Exhibit Number 303 two documents, Camel Cash Catalogue,
21 Volume Two, and another document that says, "Get the Calendar
22 That's Big on Weekends," and I'd like them marked Exhibits
23 303-A and 303-B.

24 (Plaintiff's Exhibits 303-A and 303-B are

1 marked for identification.)

2 MR. HEPLER: Where are those?

3 MR. COOK: You can find them there. They're in
4 there, too.

5 Q (By Mr. Cook) Handing you Plaintiff's Exhibits
6 Numbers 303-B and 303-A -- are those examples of promotional
7 activities?

8 A Yes, sir.

9 Q Now, I want to talk to you, Mr. Oglesby, about your
10 company's position with respect to children smoking.

11 I understand from other witnesses and I'd like you
12 to assume that the policy of your company is now that you do
13 not wish to encourage children to smoke, nor have you ever.

14 A Correct.

15 Q Is that your understanding, basically?

16 A Yes, sir.

17 Q Do you now and did you before, to your knowledge,
18 direct promotional activities towards kids?

19 A No, sir.

20 Q Now, what is the purpose of selling cigarettes at a
21 discount, sir?

22 A Well, I'm not a marketing person, so I may not be
23 very precise, but you sell at a discount to -- like you're
24 giving people more value and we see it for all consumer

1 products.

2 Q It's encouraging people to smoke; isn't it?

3 A No. Hopefully it's encouraging people to buy that
4 particular product.

5 Q So, if -- if you give three for the price of two,
6 that makes it easier for people to buy three packs of tobacco
7 or three packs of cigarettes; does it not?

8 A It makes it cheaper.

9 Q Do you understand that cost is a factor in terms of
10 children smoking?

11 A I don't understand your question, Mr. Cook.

12 Q Did you understand that the American Cancer Society
13 and others have suggested that if the price of cigarettes
14 were higher -- in other words, if the excise taxes were
15 raised on cigarettes, that it would make cigarettes harder
16 for children to get?

17 A Ohm -- price is a factor for any consumer product,
18 yes, sir.

19 Q Drives everything; doesn't it?

20 A Right.

21 Q An old supply sider like yourself, if the price is
22 raised enough, it will make cigarettes more difficult for not
23 only children to buy, but also your other consumers?

24 A Price is a factor in buying a product, sure.

1 Q This is even a better deal on Plaintiff Exhibit
2 Number 302 and this is a "Buy Three, Get Three Free." That's
3 a better deal; isn't it?

4 A If my math is right, yes, sir.

5 Q Now, I want you to assume for a minute that
6 Plaintiff's Exhibit Number 303, that that I purchased this
7 Sunday at the Hucks Store that I was talking to you about on
8 the southwest corner of Range and Jerome Lane.

9 Do you know what's on the southeast corner of Range
10 and Jerome Lane in Cahokia?

11 A No, sir.

12 Q Cahokia Commonfields High School is on the southeast
13 corner. I'd like you to assume that's true, also.

14 MR. CRIST: Your Honor, I object. I move to strike
15 Mr. Cook's testimony.

16 MR. COOK: I'm asking him to assume that. If he
17 wants to force me to prove it up, I, of course will.

18 THE COURT: Objection's overruled. You can
19 continue.

20 Q (By Mr. Cook) Do you have any policy that you're
21 aware of that RJR -- that to discourage promotion of
22 cigarettes, to make them cheaper or perhaps -- strike that
23 last part.

24 Do you have a policy at RJR to promote cigarettes to

1 make them cheaper in areas where children are, sir?

2 A No, sir. We have a policy to, you know, discourage
3 under-age smoking.

4 Q And under-age smoking means what, sir?

5 A Uh -- under eighteen.

6 Q What is magic about eighteen as far as you're
7 concerned, Mr. Oglesby?

8 A I don't know that there's anything magic, Mr. Cook.
9 Uh -- I think the age of majority is an age that most public
10 policy makers have settled on around the country as kind of a
11 defining age.

12 Q Well, with respect to smokers, wouldn't you agree
13 that people before they start to smoke, that they should
14 weigh the health risks against smoking before they start?

15 A Yes, sir.

16 Q All right. Now, what are the health risks that a
17 person who's going to start to smoke should weigh, Mr.
18 Oglesby?

19 A Mr. Cook, I think all smokers -- in fact, I think
20 every one's aware that there are serious health risks
21 associated with smoking -- heart disease, lung cancer,
22 emphysema. Probably other diseases.

23 Q Addiction?

24 A No, I don't think that's the case, but --

1 Q The Surgeon General of the United States has said,
2 has he not, that cigarette smoking is addictive?

3 A Ohm -- he may have. I'm --

4 Q Then why do you think it's not addictive?

5 A Well, common sense to me uh -- you know, when you
6 say something's addictive, I think you're saying it takes
7 away your will to choose to make up your mind. People quit
8 smoking.

9 Q People quit heroin, too.

10 MR. CRIST: Your Honor, I object. He's interrupting
11 the witness's answer.

12 THE COURT: Sustained. You can finish your answer,
13 if you're not done.

14 A (By Witness) I said millions of people have quit
15 smoking.

16 Q People quit cocaine also? You're aware of that?

17 A Yes, sir.

18 Q Do you think that cocaine is habituating?

19 A I think there's a substantial difference between
20 people, the way people act -- uh -- in those two matters.

21 Q Well, my question, of course, was, Mr. Oglesby, do
22 you think that cocaine is habituating?

23 A I don't know how to answer that.

24 Q You don't use cocaine?

1 A No, sir.

2 Q You don't smoke cigarettes?

3 A No, sir.

4 Q So, on a personal basis you really don't know
5 whether or not either one of them are habituating?

6 A I've not used either, you know.

7 Q Is there a big distinction in your mind between
8 habituating and addiction?

9 A Ohm -- yes, I think there is.

10 Q What is it?

11 A Well, I mean, I drink coffee, coffee in the morning.
12 I have a habit of drinking coffee.

13 Q You can go without the coffee, though, could you
14 not?

15 A Probably.

16 Q Do you know anybody who has tried to quit smoking
17 and has had difficulty doing that?

18 A Yes.

19 Q Were they weak-willed persons, those people?

20 A No, and eventually they were able to quit.

21 Q Do you know anybody who's used the nicotine patches?

22 A Uh -- I don't know anyone personally. I have met
23 people who have used them, yes, sir.

24 Q So, you and I then can agree when we talk about

1 that, you would prefer that things like Plaintiff Exhibit
2 Number 302 and 303, that they not be used in the vicinity of
3 high schools?

4 A Uh -- no, sir. When you say "vicinity," I don't
5 know what you mean vicinity. If there's a store and the
6 retailer wants to use, you know, our products, there's
7 nothing wrong with that.

8 Q So, you think it's all right then to use something
9 like 302, "Buy Three, Get Three Free" -- that that would be
10 all right to use this across the street from a high school?

11 A If the manager of Hucks wants to use it, yes, sir.

12 Q The business of your tobacco company is selling
13 cigarettes?

14 A Yes, sir.

15 Q And you want to sell cigarettes?

16 A We want smokers to buy our product, yes, sir.

17 Q And if a person is a day over eighteen years old,
18 you want them to buy your product; don't you?

19 A If a person decides they want to smoke and enjoys
20 smoking, we would prefer they buy our product compared to our
21 competitors, yes, sir.

22 Q And you promote your product so people will buy it?

23 A Yes, sir.

24 Q Do you take Rolling Stone Magazine?

1 A No, sir, I do not.

2 Q Are you aware of the fact that voluntary health
3 organizations and American Medical Society are critical of
4 the advertisements of the cigarette companies in magazines
5 such as Rolling Stone, and particularly Rolling Stone?

6 MR. CRIST: Object to the form of the question, Your
7 Honor. It assumes facts not in evidence. It's compound.

8 THE COURT: Are you going to address that with a
9 different question or an exhibit?

10 MR. COOK: I just -- I thought the question was
11 okay.

12 THE COURT: You were picking up something. I didn't
13 know if it was in reference to his objection. It was not?

14 MR. COOK: No, it's the next question.

15 THE COURT: The objection's overruled. You can
16 continue.

17 A (By Witness) I'm sorry, Mr. Cook.

18 Q Are you aware of the fact that there are criticism
19 of your -- uh -- advertisements, of the advertisements of
20 your industry in Rolling Stone Magazine?

21 A Rolling Stone specifically, I may not be aware. I'm
22 aware that, you know, their criticizing of advertising, yes,
23 sir.

24 Q Well, I'm just asking you specifically now about

1 youth advertising. I realize you advertise in Time Magazine
2 and Life Magazine and Sports Illustrated, but Rolling Stone,
3 wouldn't you agree, is a magazine that's intended towards a
4 youthful audience?

5 A We have no youth advertising, Mr. Cook, so I don't
6 know what -- where you're --

7 Q I understand that you say that, sir, and I'm sure
8 that you think that that's true.

9 Have you ever seen a Rolling Stone Magazine?

10 A Yes, I have.

11 MR. CRIST: Move to strike his comments.

12 THE COURT: Overruled. I don't think they were out
13 of line. Continue.

14 Q (By Mr. Cook) Do you understand that Rolling Stone
15 is a magazine that is -- is pointed towards a young market?

16 A Mr. Cook, I don't know the demographics, make up of,
17 the readership of Rolling Stone. I do know that if we
18 advertise in it or if anyone in the tobacco industry
19 advertises in it, it is directed principally to people over
20 21.

21 Q Sir, yesterday the Jury heard that in 1943, that
22 your company was charged by the Federal Trade Commission with
23 deceptive, false, inaccurate and misleading advertising, and
24 one of the respects was that "Camels never irritates the

1 throat."

2 Are you aware of the fact of that charge?

3 A No, sir.

4 Q Do you know what -- whether your industry and your
5 company -- what in fact when the FTC charged them, said,
6 "Hey, this is false, this is misleading advertising that
7 Camels don't irritate your throat," do you know what your
8 industry's response was to that, sir?

9 A No, sir.

10 MR. CRIST: Object to the form of the question on
11 the basis that the allegations that were made -- Mr. Cook
12 said it was, that they said it was true and -- I mean, it's
13 the form of the question is the basic objection.

14 In addition to that, this witness has already said
15 he does not have any familiarity with 1943 advertising.

16 THE COURT: I don't believe there is any lack of
17 clarity with the Jury from yesterday that these were simply
18 allegations, and assuming that, the objection's overruled.

19 Q (By Mr. Cook) Let me see here.

20 MR. HEPLER: Mr. Cook, you going to tell us what
21 that is?

22 MR. COOK: Plaintiff's Exhibit Number 104.

23 MR. HEPLER: The one you played yesterday?

24 MR. COOK: This is the short one. This is Vaughn

1 and the Moon Maids.

2 Q (By Mr. Cook) Do you remember Vaughn Monroe?

3 A (By Witness) Yes, sir.

4 Q Been a while since you've seen him?

5 A Yes, sir.

6 Q I want you to assume just for a minute that this
7 commercial was made around 1950.

8 I also want you to assume that the FTC charged Camel
9 cigarettes and RJR in 1943 in a complaint -- they made
10 allegations that uh -- uh -- your advertisements that Camel
11 cigarettes never irritate the throat was false, inaccurate,
12 deceptive and misleading. I want you to assume that around
13 1950 you were still making advertisements such as this on
14 television.

15 (Plaintiff's Exhibit Number 104 as reflected
16 in a videotape is played on the television for
17 the Jury as follows:)

18 "-- make the Camel's thirty-day test and you
19 will see. Do-wa-do-wa. So mild, so mild. So
20 mild that you're bound to agree that Camels
21 suit you to a tee -- to a tee. Yes. You'll
22 see how mild a cigarette can be."

23 Q (By Mr. Cook) There's nothing wrong with that, is
24 there?

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1 A (By Witness) No, sir.

2 Q That doesn't say anything about irritating the
3 throat or anything of that nature; does it?

4 A I assume that's appealing to smokers about the
5 attributes of the cigarette.

6 (Plaintiff's Exhibit 104 is further played for
7 the Jury as follows:)

8 "SPEAKER: As you probably know, I do quite a
9 bit of singing and it's important that the
10 cigarette I smoke be mild. Well, the
11 cigarette I smoke for years is Camels and they
12 always agree with my throat.

13 SECOND SPEAKER: Here's proof of what Vaughn
14 Monroe says. Noted throat specialists report
15 after examination of the throats of hundreds
16 of men and women who smoke Camels and only
17 Camels over thirty consecutive days, not one
18 single case of throat irritation due to
19 smoking Camels. Make a note. Remember your
20 throat. Try Camels today."

21 Q (By Mr. Cook) Are you old enough, sir, to remember
22 the old Camel T-Zone advertisements?

23 A I don't believe so. I believe I remember Vaughn
24 Monroe, but I don't --

1 Q Now, sir, you're aware of the fact that cigarette
2 smoke contains irritants that cause people to have sore
3 throats and cigarette coughs and things of that nature; are
4 you not?

5 A Ohm -- you know, I'm aware that cigarette smoke can
6 cause risk to people. What its affect on people is, I can't
7 speak to.

8 Q You never heard of a smoker's cough, sir?

9 A Sure, I've heard of a smoker's cough.

10 Q And, sir, the reason that I showed you this was that
11 the FTC back in 1943 said that to say that it didn't cause
12 throat irritation was false and deceptive, and your industry,
13 as you can see by that just merrily continued on advertising
14 on television saying these don't irritate your throat.

15 Are you critical of that type of promotion or
16 advertising, sir?

17 MR. CRIST: Object to this. That is a
18 mischaracterization of the FTC allegation in 1943. Object to
19 the form of the question.

20 MR. COOK: Your Honor, I would like to put into
21 evidence the FTC findings of 1952.

22 THE COURT: Simply on the allegations he indicated
23 that you didn't paraphrase it correctly. If the document's
24 available, the specific language can be used.

1 MR. COOK: I'm reading from the complaint. It
2 states that "Camel cigarettes never irritate the throat, that
3 they cause no sign of throat irritation, leave the user free
4 of throat irritation." On page 717 in general the
5 representations made by the respondents as set out in
6 paragraph two, which I just read you a portion of -- "here
7 of, and the implication and intendments thereof whether
8 specifically controverted herein or not are inaccurate,
9 deceptive, false and misleading."

10 THE COURT: And those are the allegations in '43?

11 MR. COOK: Yes, sir.

12 THE COURT: Okay.

13 MR. COOK: I would like at this time to read the
14 findings of the FTC with respect to that particular
15 allegation, Your Honor.

16 THE COURT: Were the findings entered?

17 MR. COOK: The findings were entered in -- uh --
18 1950, appealed and then a final order was entered in 1952 and
19 in that respect is that the order didn't change at all.

20 THE COURT: I'm not familiar with those findings.
21 If Counsel wishes to review them and take a position on it --

22 MR. CRIST: Well, Your Honor, it seems to me that
23 there are two issues. First of all, I think Mr. Cook has
24 mischaracterized in the questions to the Witness what it was

1 that the FTC alleged, and second of all, as the Court will
2 recall there was a lengthy side bar yesterday in which there
3 was a specific discussion of this particular topic and Mr.
4 Cook didn't intend to get into it at all and now he intends
5 to violate that understanding, and I think all testimony
6 therefore yesterday and today should be stricken on this
7 subject.

8 THE COURT: That was my understanding from
9 yesterday, that we would not be going into this aspect of it.
10 If your position or you feel the evidence has changed, well,
11 approach the bench.

12 (Side bar conference held out of the hearing
13 of the Jury.)

14 MR. COOK: It's only to his objections about the
15 allegations. I've never said that there was anything that --

16
17 THE COURT: I overruled his objection. Now, I just
18 asked you to read it. You did as far as I'm concerned. He
19 can answer the question.

20 MR. COOK: Fine.

21 (End side bar.)

22 A (By Witness) I'm sorry, Mr. Cook --

23 THE COURT: I don't blame you. You need to have
24 that read back to you?

1 Q (By Mr. Cook) My question is, sir, you stated
2 before this Jury that your company doesn't have a plan to
3 promote or market their cigarettes to children?

4 A In fact, we take steps to make sure that doesn't
5 happen.

6 Q Yes, I understand.

7 Do you know of your own personal knowledge, have you
8 ever taken a step to make sure that that doesn't happen, sir?

9 A I am aware of things that we have done as a company
10 to make sure that doesn't happen.

11 Have I personally done anything?

12 Q Yes.

13 A No, sir.

14 Q Are you aware of any advertising -- you've put out
15 some publications to parents about making sure that their
16 kids obey them and things like that and that they have a
17 proper relationship with each other?

18 A Yes, sir.

19 Q Do you ever put in any of those things that kids
20 shouldn't smoke?

21 A Uh -- we have put health risk information in our
22 publications. I'm not sure what you're talking about in
23 terms of --

24 Q Well, I've read a couple of them and they just talk

1 about parents and kids should listen to their parents and
2 parents should listen to their kids, and they should interact
3 with each other, and all that type of stuff. I never seen
4 one that says smoking causes cancer and you shouldn't smoke
5 cigarettes because you may die from it. Have you seen
6 anything like that, sir?

7 MR. CRIST: I object to this on the form of the
8 question. I object to this on the basis that there is
9 absolutely no question but that's preempted. I object to it
10 on the basis that the documents speak far better than Mr.
11 Cook's reconstruction of those documents say, and in addition
12 to that, Your Honor, it's in clear violation of the Order in
13 Limine in this case.

14 MR. HEPLER: I join in that objection.

15 THE COURT: The Preemption Doctrine applies to
16 advertising and promotion. It does not apply to
17 communications that are unrelated to advertising. I'm going
18 to have to look at this document. If you're going to make a
19 direct reference to a specific document, I'll examine it.

20 MR. COOK: I was referring to all of them. Mr.
21 Crist is welcome to show you any one that he wants. The only
22 thing I asked him was whether any of the documents say that.

23 THE COURT: I assume your question is based on a
24 particular document?

1 MR. COOK: No, it's not, Your Honor.

2 MR. CRIST: Your Honor, it necessarily was, and I
3 also asked the Court to revisit Preemption Doctrine. May we
4 approach the side bar on this?

5 (Side bar conference held out of the hearing
6 of the Jury.)

7 THE COURT: Well, these publications that were
8 directed to children, no one's taking the position they're
9 advertising, are they?

10 MR. CRIST: Your Honor, I am taking the position --
11 first of all, I don't know what you mean by documents that
12 are sent to children.

13 THE COURT: He made reference to it, I thought, to a
14 specific document.

15 MR. COOK: I don't know how many they've published.

16 THE COURT: Well, there is at least one you've
17 talked about in this case, isn't there?

18 MR. COOK: I don't even know what he's read. I
19 mean, I'm just asking him of the documents he's seen have
20 they ever said that. The ones I've seen don't say that, but
21 perhaps he's seen one that did. I don't know what his answer
22 is.

23 MR. CRIST: That's not the way the question was
24 phrased.

1 In addition to that, Your Honor, paragraph 8 of this
2 Court's Order in Limine precludes this kind of inquiry. It's
3 been ruled on time and time and time again. Judge LeChien
4 made a statement. Mr. Cook has been admonished time and
5 again not to frame that kind of question and, Your Honor, the
6 simple fact of the matter is that there is no duty to warn on
7 behalf of the Tobacco Institute and no duty to warn on the
8 part of Reynolds beyond that set forth in the -- (inaudible).
9 There is no claim that Mr. Cook can make that there has been
10 failure to adequately warn consumers period.

11 MR. HEPLER: And we've had many, many discussions
12 that resulted in the specific rulings of paragraph 8 of Judge
13 LeChien's Motion in Limine that there's no duty -- that's
14 clearly ruled upon -- on the part of the Tobacco Institute to
15 warn and clearly that he can not go into those subject
16 matters beyond limitations as set forth in paragraph number 8
17 and after July of 1969, the Court has already clearly ruled
18 upon that, and what could be more patently clear in this case
19 than to say, "Did you put out any publications that had a
20 warning that this could cause cancer with regard to use?"
21 He's mischaracterizing that evidence.

22 The document that I think he's referring to is a
23 document put out through the Education Association dealing
24 with how parents and children should interact so they can

1 talk about difficult matters.

2 THE COURT: Let me ask you this: If anybody
3 directed a publication to people under the age of 18, and
4 could not be advertising on the position that the company has
5 taken, without a doubt. Now, the Supreme Court in the
6 Cipollone case did not extend this beyond advertising and
7 promotion. Now, is there any -- is there any dispute about
8 that?

9 MR. CRIST: Your Honor, the question is how you read
10 the Cipollone Decision and how Judge LeChien read the
11 Cipollone Decision and how it's properly read.

12 MR. COOK: Now he's reading it.

13 MR. CRIST: I think that it's absolutely clear under
14 Cipollone that there is no duty to warn after July 1969
15 period now.

16 MR. COOK: I don't resist that.

17 THE COURT: Beyond advertising and promotion.
18 Anything that they do, any contact they have of any nature,
19 they have no duty beyond that.

20 MR. CRIST: Because the act itself says clearly and
21 unequivocally that it's a warning which is adequate to inform
22 consumers of relationship to smoking and --

23 MR. GOOLD: I think the concept was requiring the
24 warnings in every pack and every ad.

1 THE COURT: Absolutely, on every pack and every ad.

2 MR. GOOLD: That establishes an adequate warning for
3 the American public, an adequate means of disseminating that
4 warning -- the duty is satisfied.

5 THE COURT: We're talking about something -- I'm
6 interpreting as being sent a directive to children, and
7 you're telling me that that's governed by this Preemption
8 Doctrine they said that they had directed towards children --
9 the Witness --

10 MR. CRIST: No, he didn't.

11 THE COURT: That there have been efforts made to
12 inform children not to smoke.

13 MR. CRIST: I don't think that's what the testimony
14 said.

15 THE COURT: Well, we'll read it back then. He said
16 he didn't personally do it, but he's aware of efforts the
17 company's made.

18 MR. CRIST: To discourage youth from smoking.

19 THE COURT: Absolutely, discourage it. That was
20 exactly what he said.

21 Okay. Now, that could not be advertising because
22 you would never direct advertising under this market, so I --
23 I -- we're going to make this more specific on your question
24 so that I kind of know what you're really thinking. The way

1 I heard your question, it was so specific I thought you were
2 referring to a specific document. If you're just asking the
3 man for what documents he's aware of, just ask him that.

4 MR. COOK: Well, I think there's only one.

5 THE COURT: Well then, just ask him.

6 MR. COOK: And it's been marked in evidence here,
7 but I don't know where it is.

8 THE COURT: Well, I would like to have him identify
9 what he thinks they are or I'd like to see that and then I'll
10 rule on whether it's covered by this Motion in Limine.

11 MR. COOK: Perhaps, Judge -- I wouldn't say they're
12 a lot better lined up than I am, but perhaps they could find
13 it if they want me to refer to one particular document.

14 THE COURT: They don't want you to refer to -- I
15 mean, all they want -- I'm not clear on the last question, I
16 guess, what was asked. So, I'm asking that that be
17 rephrased.

18 MR. COOK: I guess they need to know or something.
19 I might have it over here in this mess.

20 THE COURT: As I understand the purpose of your
21 question was just to elicit from the man what effort was made
22 and what documents were used.

23 MR. COOK: And what's contained in it. But I think
24 there could be more than one.

1 THE COURT: Then just ask him that.

2 MR. COOK: Okay. I'll be glad to.

3 THE COURT: Rather than -- if you're going to make
4 reference, be so specific, please. Make reference to a
5 document so they can look at it. I'll look at it and we'll
6 specifically go into this out of the presence of the Jury as
7 to whether it's covered by this, but I have a real concern,
8 and as I think I've already stated what I think that case
9 says.

10 Let's see what he does on rephrasing it.

11 MR. GOOLD: Your Honor, I think for instance the RJR
12 Nabisco Annual Report, that's not advertising. Can Mr. Cook
13 ask Mr. Oglesby where in that annual report did you put the
14 warnings? Where did you tell them?

15 THE COURT: That's not the purpose of that report,
16 but if the purpose of this document is to inform children
17 about this, then you might have taken the issue on.

18 Yes, let's keep it in perspective. Let's look at
19 the documents that we're talking about.

20 (End side bar.)

21 THE COURT: Let's continue. Does anybody need to
22 take a break?

23 We'll have a rule from now on if we go too long and
24 we need to take a break, raise your hand. Okay. Let me

1 know.

2 Let's take a brief break and we'll come back and
3 work till one and then we'll stop. We're going to take five
4 minutes.

5 (This concludes the portion of the day's
6 proceedings reported by Karen S. Landrum,
7 RPR.)

8 * * * * *

9 (The following portion of the proceedings were
10 reported by Judy L. Tiemann, C.S.R. No. 084-003135.)

11
12 (The following proceedings were had in open court
13 out of the presence of the jury.)

14 THE COURT: If you want to go on the record if
15 you're planning on using the document --

16 MR. COOK: Well, I don't know if this is the
17 document that the tobacco industry has put out. I think it
18 is. I don't know why else you would have given it to me.

19 MR. GOOLD: Judge --

20 MR. COOK: May I ask if we're going to discuss this
21 that the -- that the witness be excluded from the courtroom?

22 THE COURT: Well, let's decide whether we're going
23 to discuss it. Do you want to go into it?

24 MR. COOK: I'm going to go into it. This is the

1 document that I was referring to. My understanding --

2 MR. HEPLER: I don't think the front page looks like
3 that. The front page looks like this. Maybe not. Maybe
4 you're right.

5 MR. COOK: I don't know. You guys gave it to me.

6 MR. HEPLER: I don't --

7 THE COURT: Okay. Well, we can -- if you'd --
8 you're requesting that the defendant -- the witness leave the
9 courtroom during this discussion?

10 MR. COOK: Yes, sir.

11 THE COURT: Do you want to take a position on it, or
12 would you ask him to leave?

13 THE WITNESS: I'm right here.

14 MR. HEPLER: We have no problem.

15 MR. COOK: Judge -- Judge Donovan, do you know
16 that -- that Mr. Oglesby is -- is Tommy Hunter's first
17 cousin?

18 MR. CRIST: It's true.

19 MR. COOK: True.

20 THE COURT: Very nice man.

21 MR. COOK: Yeah, that's why I'm being nice to him.
22 Hunter may shoot me.

23 THE COURT: Okay. Let's talk about this then.

24 MR. COOK: Well, I -- I'm given to understand that

1 this is their publication that they participated in with Joy
2 whatever her name is or what kind -- what kind of free
3 loading name did that lady have?

4 MR. GOOLD: Jolly Ann Davidson.

5 MR. COOK: Jolly Ann, the -- Davidson and those
6 people that this is -- is the proposal that they talk about
7 that they put out with respect to the cooperation with the
8 State Boards of Elections [sic].

9 THE COURT: When was it produced, and who was it
10 produced by?

11 MR. GOOLD: Well --

12 THE COURT: Do we know?

13 MR. CRIST: This document was produced by the
14 Tobacco Institute, Your Honor.

15 THE COURT: And do we know when?

16 MR. HEPLER: You mean produced in this case?

17 THE COURT: No, no, I mean when was this document
18 prepared? What's the time frame on it?

19 MR. GOOLD: Your Honor, I believe --

20 MR. CRIST: I think we've got a copyright date on
21 it.

22 MR. GOOLD: I believe that particular document --

23 MR. CRIST: July 1984. It's on page three.

24 THE COURT: July 1984. Okay.

1 MR. CRIST: It's the third page, Your Honor, of the
2 document. The page is not numbered.

3 THE COURT: Was done by the Tobacco Institute in
4 conjunction with who?

5 MR. CRIST: Your Honor, it was done by the National
6 Association of State Boards of Education.

7 MR. HEPLER: Funded by --

8 MR. CRIST: Funded by or made possible by the
9 Tobacco Institute.

10 THE COURT: Okay.

11 MR. COOK: Or -- you know, the thing that I was
12 asking him, are there others that they've put out?

13 MR. CRIST: That wasn't the question you asked him.

14 MR. COOK: No, I asked him if any of the documents
15 that they put out did they say anything else. My question
16 was broad.

17 MR. CRIST: No, your question was -- your question
18 characterized a document or documents and then loaded it up
19 and then violated preemption.

20 THE COURT: Okay. But we're even away from that
21 now. This is --

22 MR. CRIST: Now we're asking a different question.
23 The question of the witness --

24 THE COURT: This is not your document. I mean, you

1 produced it, but you didn't -- it was done by somebody else.

2 MR. CRIST: We did not produce it, Your Honor. The
3 documents --

4 MR. HEPLER: You're getting confused.

5 THE COURT: Tell me.

6 MR. GOOLD: This was a document that was produced in
7 this litigation by the Tobacco Institute.

8 THE COURT: Right.

9 MR. GOOLD: The -- the preparation of the document
10 was funded by the Tobacco Institute --

11 THE COURT: Right.

12 MR. GOOLD: -- in cooperation with and under the
13 auspices of the National Association of State Boards of
14 Education.

15 THE COURT: Do we agree that the State Board of
16 Education prepared that document?

17 MR. HEPLER: Yes.

18 MR. COOK: I don't agree to anything. I -- I -- I'm
19 going to hand him this and ask him is this -- I mean, he's
20 talked about --

21 THE COURT: That sounds fair to me, but I mean at
22 least I'm better -- if it's some document other than this
23 that he talked about, fine.

24 MR. COOK: I suspect, although they've not produced

1 other documents other than this.

2 MR. GOOLD: And we would agree, Your Honor, that it
3 was made copies printed through directly or indirectly of the
4 Tobacco Institute expense and were disseminated. My point --
5 so the question about the specific document in terms of who
6 the author is, it's the National Association of State Boards
7 of Education I understand, but more particularly back in the
8 question of some implication I think we're headed for from
9 Mr. Cook that this document should have born a warning --

10 MR. COOK: No.

11 MR. GOOLD: -- concerning health issues gets us --

12 MR. COOK: I don't suggest that at all. I just -- I
13 just suggest that if you send things out to children to -- to
14 help them make their mind up about whether or not they're
15 going to smoke or not and to the public at large, and you
16 don't include in there the -- the fact that cigarette smoking
17 causes cancer is that that is deceptive, deceiving and
18 fraudulent to do that, and, therefore, under this page of
19 Cipollone is admissible against both of you.

20 THE COURT: Well, as of right now we haven't found
21 such a document, but that's why we're going to go back on the
22 record, okay, and talk to the witness.

23 Okay. Let's go back to work and work till 1:00. Ask the
24 gentleman to come back. Ask the jury to get in the box.

1 (The following proceedings were had in the presence
2 and hearing of the jury.)

3 THE COURT: Please continue.

4 MR. COOK: Thank you.

5 (The cross examination of Mr. Marion B. Oglesby by
6 Mr. Cook continued as follows.)

7 Q (by Mr. Cook) Mr. Oglesby, does the tobacco
8 industry -- do -- do you target segments of our society for
9 your advertisements?

10 A Mr. Cook, I'm not a marketing person, but we do
11 advertise to certain people about certain attributes of our
12 products, yes, sir.

13 Q Do -- do -- do you target poor people?

14 A No, sir.

15 Q You would agree with me that targeting poor people
16 would be irresponsible; would you not?

17 MR. HEPLER: Object, Your Honor, to the form of the
18 question.

19 MR. CRIST: Object to the form.

20 MR. HEPLER: It's argumentative.

21 MR. CRIST: Object to the form of the question.
22 Also object on the grounds of preemption.

23 THE COURT: Any comment, Mr. Cook, with regards to
24 whether it actually is a decision for the jury to be making

1 in this case or -- just on that area, do you want to remark
2 at all?

3 MR. COOK: Well, I think it has to do with -- with
4 both prior to periods of time of preemption, has to do with
5 the witness's credibility, has to do with -- with a variety
6 of things that I think if I would be making a speaking
7 response to the objection, I don't think you want me to do
8 that in front of the jury.

9 THE COURT: Okay.

10 MR. COOK: I'd be glad to.

11 THE COURT: No. Okay. I'm going to allow the
12 witness to answer the question.

13 THE WITNESS: Could you please restate the question?

14 THE COURT: Yes, sir, we can.

15 (To the Court Reporter) Can you restate the question?

16 (Whereupon the Court Reporter read back the
17 following question:)

18 "Question: You would agree with me that targeting
19 poor people would be --

20 MR. COOK: Irresponsible.

21 THE COURT: If you have an answer, please give it.

22 THE WITNESS: We market cigarettes to all smokers
23 regardless of income, gender. So we're marketing a consumer
24 product that people of all types buy and use.

1 Q (by Mr. Cook) Sure. But you think if you -- and I
2 just want you to assume hypothetically, and Mr. Brown -- I
3 mean, Mr. Oglesby, I want you -- you know, I certainly don't
4 think this is true, but I want you to assume that -- that
5 just for a minute that the tobacco industry goes around
6 housing projects and -- and advertises its products through
7 billboards around housing projects. That would be targeting
8 disadvantaged people; would it not?

9 MR. CRIST: Object, Your Honor, to the form of the
10 question. I also object on the basis of preemption.

11 THE COURT: Overrule the objection on both grounds.
12 Do you have an answer to the question?

13 THE WITNESS: Mr. Cook, we use billboards. The
14 placement of those billboards I'm sure is something that's
15 done in conjunction with the local billboard company.

16 Q (by Mr. Cook) Sure. In Bethesda, Maryland, do you
17 have a lot of billboards advertising cigarettes in your
18 neighborhood, sir?

19 A In Bethesda because of the interstate, there are a
20 lot of billboards, yes.

21 Q On the interstate. What about next to your house,
22 sir? Do you have -- do you have any --

23 A No, sir.

24 Q You don't?

1 A No, sir.

2 Q Okay. Now, what I'm trying to -- to get you to
3 assume is -- is that the tobacco industry, for example,
4 you're familiar with -- with -- with this community, aren't
5 you, St. Clair County?

6 A Somewhat.

7 Q You've been gone for a long time, but in this
8 community, you're aware of the fact that -- that -- that East
9 St. Louis has -- has a collapsed tax base; you're aware of
10 that, aren't you?

11 MR. HEPLER: Show my objection.

12 Q (by Mr. Cook) Generally aware that East St. Louis
13 is not the healthiest --

14 MR. HEPLER: Relevance and materiality.

15 THE COURT: The objection's overruled. I assume
16 you're going to connect it up.

17 Q (by Mr. Cook) Sure. And you're aware that, for
18 example, this city, Belleville, that it's more affluent
19 than -- than -- than East St. Louis generally?

20 A All right.

21 Q You're familiar with State Street in East St. Louis?

22 A I don't believe so specifically.

23 Q That's the street that starts from -- actually
24 Collinsville Avenue and Martin Luther King runs a little bit,

1 and then State Street runs straight up the hill, turns into
2 West Main Street and comes right outside this courthouse
3 right there. Are you familiar with that street?

4 A In Belleville?

5 Q Well, it's West Main in Belleville. It's State
6 Street in East St. -- State Street and ML King in --

7 A I'm taking it in Belleville, so I -- but I don't
8 know -- I don't know the location in East St. Louis.

9 Q My essential question was to you is whether or not
10 the tobacco industry targets poor people for its
11 advertisements and --

12 MR. CRIST: Object to the form.

13 Q (by Mr. Cook) -- and you say that you don't know of
14 any target in that regard. They just target everybody.

15 MR. CRIST: Object to the form of the question.
16 Object to preemption.

17 MR. HEPLER: Asked and answered also, Your Honor.

18 THE COURT: I think it is asked and answered.

19 MR. COOK: I'm not sure what the answer was. I was
20 suggesting him that's what his answer was, and if it was,
21 then I'll go on to the next question.

22 THE COURT: Okay. If that will -- do you want it
23 read back or do you understand?

24 THE WITNESS: No, help me, Judge. I'm not sure

1 where we are.

2 Q (by Mr. Cook) Well, let me -- let me rephrase the
3 question. If I understand your answer that -- that you don't
4 think that -- that the tobacco industry has -- has decided to
5 target young people for their promotion of their product?

6 MR. CRIST: Object, Your Honor, preemption.

7 THE COURT: The objection's overruled.

8 MR. CRIST: Could I have a continuing objection,
9 Your Honor?

10 THE COURT: Yeah. It is a continuing objection, so
11 it -- you won't have to do it each time. Okay. Appreciate
12 that. Thank you. Continue.

13 THE WITNESS: I'm sorry, Mr. Cook.

14 Q (by Mr. Cook) Yes. You don't think the tobacco
15 industry -- I believe you testified earlier that -- that you
16 don't want kids to smoke?

17 A Correct.

18 Q Therefore, you wouldn't advertise to children --

19 A Absolutely.

20 Q -- because you don't want them to smoke.

21 A Correct.

22 Q All right. Now, what I've done is tried to take the
23 question a little bit beyond that. Do you -- do you target
24 poorer people as opposed to richer people with respect to the

1 sale of your product?

2 A I don't believe we target poorer people with respect
3 to richer people.

4 Q Now, the other question was is that it wouldn't be
5 appropriate to do that. That's not fair, is it? If -- if
6 that was done, I'm not asking you to say that it -- it is
7 done. I'm just saying it wouldn't be fair.

8 MR. HEPLER: Objection. Calls for conclusion, calls
9 for speculation. It's argumentative.

10 THE COURT: He can answer the question. I think he
11 has answered it, but he can answer it again.

12 MR. HEPLER: Asked and answered then. Thank you,
13 Your Honor.

14 THE COURT: Just give your answer.

15 THE WITNESS: I'm sorry. Where are we? Excuse me,
16 the question?

17 THE COURT: Is regarding the poor people.

18 Q (by Mr. Cook) Whether it would be fair to target --

19 A We don't -- we don't target poor people is what I
20 said.

21 THE COURT: Okay. Good enough.

22 Q (by Mr. Cook) Do you target minorities, gender,
23 race or ethnic minorities?

24 MR. CRIST: Object, Your Honor, relevance,

1 materiality.

2 THE COURT: Objection overruled. You can answer.

3 THE WITNESS: Mr. Cook, I'm not a marketing person,
4 but I know that with our products, like any consumer
5 products, we test the people that use our products to find
6 out what they like, what they don't like, what attributes
7 they would like in the product, and certain people like
8 certain things in products, and our advertising, depending
9 upon the product or the cigarette, might be targeted to a
10 particular attribute of that product which would appeal to
11 certain consumers.

12 Q (by Mr. Cook) Yes. For example, although it isn't
13 your product, but probably one of the most I guess not -- it
14 isn't Eve. I don't have one with me, but Virginia Slims is a
15 -- a product I think that you and I can agree that it's not
16 manufactured by your company, that -- that is intended for a
17 feminine market?

18 A I would suppose that the bulk of the consumers of
19 that product are female.

20 Q For example, there's a Virginia Slims tennis
21 tournament; is there not?

22 A There have been. I don't know that there are now.

23 Q Not many men play in that tournament?

24 A That's correct.

1 Q None. It's a -- it's a tournament for -- for -- for
2 women --

3 A That's my understanding it's always been that way.

4 Q Now, I want you to assume just for a minute that --
5 that this street right out here, this four-lane street called
6 West Main Street and that if you go west on that street and
7 you stay on that street, you will -- you will actually end up
8 on the interstate, but you -- you will come to Collinsville
9 Avenue in East St. Louis. Do you know where Collinsville
10 Avenue in East St. Louis is?

11 A I -- I don't really recollect.

12 Q It's the downtown street.

13 A Okay.

14 Q And if you stay on this street that -- that you will
15 get all the way to Collinsville Avenue, there's seven miles
16 of the street on top of the hill; there's seven miles of the
17 street below the hill, and it runs half a mile short of the
18 river.

19 I want you to assume that there are no cigarette
20 advertisements on billboards from here to East St. Louis, and
21 yet from East St. Louis to Collinsville Avenue right now,
22 there are more than 20 billboards advertising cigarettes
23 today.

24 Why do you think that (a) there are no billboards in

1 Belleville from here to there, and (b) that there are more
2 than 20 from the edge of the bluff to Collinsville Avenue?
3 Do you have any explanation for that at all?

4 A I have no idea.

5 MR. CRIST: Object to the form of the question, Your
6 Honor. In addition to that, I also object, move to strike
7 Mr. Cook's testimony, and with respect to that, I also object
8 on the basis that it calls for speculation on the part of
9 this witness and the basis that it's a hypothetical without
10 any basis in the record for a hypothetical.

11 THE COURT: There's no basis in the record at this
12 time to my knowledge. I assume that you will supply that.

13 MR. COOK: I will.

14 THE COURT: The defendant -- the witness has
15 answered the question, and the objection is overruled.

16 Q (by Mr. Cook) You don't have any explanation for
17 it?

18 MR. HEPLER: Asked and answered.

19 THE WITNESS: No, because I'm not -- I mean, I don't
20 --

21 Q (by Mr. Cook) Have you ever been to the Country
22 Club in -- in Belleville, Illinois?

23 A I don't believe so.

24 Q I just ask you to assume that in the neighborhood of

1 the Country Club that there are -- there are no cigarette
2 advertisements by billboards.

3 A Are there billboards?

4 Q There are no cigarette advertisements by billboards.
5 I'd be surprised if there were billboards period.

6 Do you know where the Roosevelt Homes are in East St.
7 Louis?

8 A No, sir.

9 Q How many cigarette advertisements do you think that
10 there are around the Roosevelt Homes?

11 A I don't know, sir.

12 MR. CRIST: Objection, Your Honor, calls for
13 speculation.

14 THE COURT: Sustained.

15 Q (by Mr. Cook) Just assuming that there are
16 cigarette advertisements by the DeShields Housing Projects
17 and -- and the Gompers Housing Projects and the Roosevelt
18 Homes in -- this is actually in Washington Park, Rosemont
19 [sic], would you have an explanation from the point of view
20 of marketing why areas with disadvantaged people are -- have
21 billboards advertising cigarettes on them while people who
22 live more affluently -- I guess the most affluent place in
23 our community is in the Country Club area don't?

24 MR. CRIST: Objection to the form of the question,

1 Your Honor. In addition to that, I object on the basis that
2 it calls for speculation and guess work on the part of this
3 witness.

4 MR. HEPLER: Show my objection to the form,
5 materiality and relevance also, Your Honor.

6 THE COURT: Okay. I'm going to sustain the
7 objection. We've gone into this area I think at least three
8 times now.

9 Q (by Mr. Cook) Now, with respect to -- I
10 understand -- with respect to youth and smoking, I'm given
11 the impression that -- that your industry has done
12 something -- I believe you even said it -- to discourage
13 children from smoking?

14 A Yes, sir.

15 Q What have you done?

16 A Well, I think for -- for many years, the industry
17 has taken steps to try and discourage under-aged smoking.
18 I'm more familiar with things that have happened in the last
19 two or three years. The Tobacco Institute has an on-going
20 program dealing with helping parents to -- to deal with the
21 issue of smoking with their children.

22 Our company has had a -- a program which goes to what I
23 think is the principal reason -- one of the principal reasons
24 people start to smoke which is peer pressure, and we've tried

1 to go to school systems all across the country to introduce a
2 program which basically says smoking's not cool, to talk to
3 the kids in language they understand, that smoking's dumb,
4 not a cool thing to do to discourage smoking.

5 The more important thing I think is the retail program
6 that the industry's had for years. We also, as a company,
7 have done this which basically talks about -- with the
8 retailers. It's, you know, against the law to sell to
9 younger people, to use signage to discourage that, support
10 the law programs.

11 Q Well, why do you oppose bans on -- on vending
12 machines?

13 A Mr. Cook, depending on the legislative context, you
14 know, a ban, you know, may overreach in terms of
15 accomplishing its objective.

16 Q Well, I understand that -- that -- that for
17 Mr. Lewis and indeed the Surgeon General's Report that a very
18 small number of the cigarettes that are sold by the cigarette
19 industry are sold through vending machines; is that your
20 understanding also?

21 A I believe that's my understanding, yes, sir.

22 Q I understand also that -- I believe that back as far
23 as 1930s, 1937, that people were asking for bans on health
24 organizations, people like the American Cancer Society and

1 the World Health Organization and the PTA and people like
2 that were asking for bans on cigarette machines. I want you
3 to assume that's true just for a second.

4 MR. HEPLER: Show my objection to the form of the
5 question in terms of no facts in evidence that he could
6 assume, and it's mischaracterizing the definition all the way
7 back to 1937 on all of those organizations.

8 Q (by Mr. Cook) I'd like you to assume in 1937 --

9 THE COURT: Overruled. You can complete the
10 question.

11 Q (by Mr. Cook) I'd like you to assume that -- that
12 that's true. Can you think of a reason why the Parent-
13 Teachers Association would want cigarette machine -- a ban on
14 cigarette machines?

15 MR. CRIST: Object to the form of the question, Your
16 Honor.

17 THE COURT: Speculation as to how he can interpret
18 what they thought.

19 MR. COOK: Well, I'm asking for his opinion on why
20 they would recommend that.

21 MR. CRIST: Object to --

22 THE COURT: On why they -- why they had that
23 opinion. Sustained.

24 Q (by Mr. Cook) Can you agree that the Parent-Teacher

1 Association's interest in smoking and health would probably
2 have to do with children's smoking and health?

3 A Yes, sir.

4 Q Could you agree that if they recommended a ban, that
5 it was probably because they thought that cigarette machines
6 had a hard time telling who was 18 or 21 and who was 14?

7 MR. CRIST: Object to the form.

8 MR. HEPLER: Object to the form of the question.
9 Speculation and conclusion also, Your Honor.

10 THE COURT: I'm going to let him answer it. It's
11 overruled. Go ahead if you have an answer.

12 THE WITNESS: I don't know what the reason was. I
13 think I responded earlier as to what their motivation was.

14 Q (by Mr. Cook) Now, I'm going to hand you
15 Plaintiff's Exhibit No. 154 and ask you if you've seen that
16 document before?

17 THE COURT: Each of the attorneys have looked at
18 154; is that correct, or do you wish to look at it again?

19 MR. HEPLER: Looked at it, Your Honor. Thank you.

20 THE COURT: Okay.

21 THE WITNESS: Mr. Cook, I'm not sure I've seen this
22 specific -- this is an '84 document, and it's not our current
23 program, and I'm not sure I've seen this specific document.

24 Q (by Mr. Cook) I don't think I've seen your current

1 program, so you and I will be about even.

2 A Okay.

3 THE COURT: Next question.

4 Q (by Mr. Cook) Sir, looking at Plaintiff's Exhibit
5 No. 154 which has been indicated to me it was funded by the
6 Tobacco Institute and was published by -- developed by the
7 National Association of the State Board of Education in 1984.
8 That's -- that document doesn't say anything about cigarette
9 smoking at all that I can see.

10 A Well, Mr. Cook, on this page I'm just reading, it
11 says, "Tobacco Institute is an association of cigarette
12 manufacturers who, as a matter of long time policy and
13 practice, believe that smoking is an adult custom. Simply
14 put, the people who make cigarettes don't want young people
15 smoking them."

16 Q Yes. Read the -- read the introduction, part one,
17 growing pains.

18 A Mark Twain wrote --

19 Q I just want you to look at it, sir.

20 A I'm sorry, I thought you said read. I'm sorry.

21 Q What I'm trying --

22 A I'm sorry.

23 Q The -- the point that I have about that -- about the
24 document and -- and I'll ask you about the document that

1 you've put out now. In the document, does it ever tell kids
2 that they shouldn't smoke because as it may kill them? That
3 document doesn't. Does the one that you put out now say,
4 "Hey, if you smoke you may die from it," or "Hey, cigarette
5 smoking causes cancer," or "Hey, cigarette smoking causes
6 emphysema." You understand emphysema kills people? Are you
7 aware of that?

8 A Yes, sir.

9 MR. CRIST: Objection to the form of the questions,
10 Your Honor.

11 Q (by Mr. Cook) Does it say --

12 THE COURT: It's compound. Restate it.

13 MR. COOK: Sure.

14 Q (by Mr. Cook) The -- what I'm trying to find out,
15 in 1984 the document that was sponsored by the Tobacco
16 Institute in their marvelous program of helping children
17 telling them to obey their parents -- and there's a
18 questionnaire in there. The questionnaire doesn't ask
19 whether they smoke or not. What I'm trying to find out from
20 that document since 1984, it's now 1992, you apparently are
21 publishing documents now that tell 17-year-olds and 16-
22 year-olds that it's not cool to smoke. Is that --

23 A Correct.

24 MR. CRIST: Object to the form of the question.

1 Q (by Mr. Cook) Do you tell them it will kill them?

2 MR. CRIST: Object --

3 THE COURT: Hold on.

4 MR. CRIST: -- to the form of the question, Your
5 Honor.

6 THE COURT: Overruled.

7 MR. CRIST: Object on the basis of preemption.

8 THE COURT: The last question -- did you hear his
9 last question?

10 THE WITNESS: Yes, sir.

11 THE COURT: Proceed if you would.

12 MR. CRIST: Objection on the basis it's preempted,
13 Your Honor.

14 MR. HEPLER: Also materiality and relevance, Your
15 Honor.

16 MR. COOK: I'm not talking about any advertisements
17 or anything of that nature, Judge.

18 THE COURT: It's my understanding we're not talking
19 about any advertisement or promotional material. We do not
20 have the document here. We just have a description of it. I
21 don't think it's covered by the preemption. The objection is
22 overruled. Go ahead and answer if you can.

23 MR. CRIST: Your Honor, I also object on the basis
24 it violates the in Limine Order.

1 THE COURT: Your objection is noted. I don't
2 believe it violates the in Limine Order.

3 THE WITNESS: No, sir, Mr. Cook. We do talk about
4 health risk, but I don't believe we use that language.

5 Q (by Mr. Cook) What I'm trying to find out is when a
6 person -- that's how we got started in this. Sometimes this
7 seems that we end up far field. You said that people when
8 they make the decision on whether they're going to smoke or
9 not, on their 18th birthday it's perfectly all right for them
10 to make the decision as far as you're concerned whether
11 they're going to smoke or not?

12 A Yes, sir.

13 Q All right. On -- on -- on -- on the day before
14 that, you object to it because it's an adult custom?

15 A Mr. Cook, I think I've said, we -- we would oppose
16 and object to under-aged smoking.

17 Q Right. But you're not opposed to it because it's
18 any safer for a kid to decide to smoke on his 18th birthday
19 than it is on the 364th day of his -- of his 17th year. It
20 isn't any safer for him one day before than it is one day
21 later, is it?

22 A Mr. Cook, I think all people, teenagers of all ages
23 are aware of the health risk associated with smoking.

24 Q I asked you that, too, didn't I?

1 A Yes.

2 Q No, I didn't, sir. I asked you is it any safer for
3 him the day before he's 18 -- or her -- to start smoking the
4 day before they're 18 than the day after they're 18?

5 A The same risk would be there, yes, sir.

6 Q Right. So -- so when -- when you want children to
7 -- who are -- who -- who smoke, there are more than 6,000,000
8 regular smokers who are under 19 years old in this country
9 according to the Surgeon General in 1979.

10 MR. HEPLER: Show my objection. Mischaracterization
11 of the evidence.

12 THE COURT: The objection's overruled. I'm not
13 indicating that his characterization is correct by making
14 this ruling.

15 MR. COOK: We can be sure. Who has the 1979? May I
16 have that blue book there, Darlous, on the other side?

17 Q (by Mr. Cook) I want to read -- do you know Joe
18 Califano?

19 A I don't know that I've ever met -- I may have met
20 Mr. Califano.

21 Q Democrat. You run in different circles.

22 A Not necessarily.

23 Q I want to read to you from the last paragraph of
24 Plaintiff's Exhibit No. 54 which is the Surgeon General --

1 1979 Surgeon General's Reports. "And the new report, unlike
2 its predecessor, takes up the subject of smoking among
3 children. The percentage of girls age 12 to 14 who smoke,
4 for example, has increased eight-fold since 1968. Among the
5 age group 13 to 19, there are now 6,000,000 regular smokers.
6 100,000 children under 13 are regular smokers." That's a
7 tragic figure, isn't it?

8 A It's a troublesome figure, yes, sir.

9 Q And so it looks like then -- then this document may
10 have been put out -- this 1984 document could have been put
11 out with that thought in mind?

12 A Could have.

13 Q But no where in that document does it tell those
14 children who were making this decision whether they're going
15 to smoke or not that it may kill them.

16 MR. CRIST: Object to the form of the question, Your
17 Honor, preemption.

18 THE COURT: You're referring to Exhibit 154 at this
19 time?

20 MR. COOK: Yes, sir.

21 MR. CRIST: Your Honor, I also object on the basis
22 there's no allegation the National Association of State Board
23 of Education has a duty to warn or to advise in this
24 document.

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1 THE COURT: Okay. That -- some indication's there's
2 going to have to be that in my opinion that the Tobacco
3 Institute had some control over the preparation of the
4 document since the document indicates that it was prepared by
5 who?

6 MR. CRIST: National Association of State Boards of
7 Education.

8 THE COURT: Till some additional foundation is laid,
9 I will sustain that objection, but you can continue.

10 MR. COOK: Sure.

11 Q (by Mr. Cook) In the documents that you put out now
12 -- when I say you, is that RJR? Do you put them out?

13 A We put some out; the Institute puts some out.

14 Q All right. And -- and -- well, the ones the
15 Institute puts out, not referring to 154, but your concern
16 about children smoking, do you warn them, for example, that
17 one out of -- that the Surgeon General says that one out of
18 every four people -- let me strike that.

19 Do you inform them in the documents that you put out for
20 children, do you inform them that one out of every four
21 people who smoke the Surgeon General says will die from
22 smoking?

23 MR. HEPLER: Object.

24 MR. CRIST: Objection, Your Honor, preemption.

1 MR. HEPLER: Also in violation of Paragraph 8 of the
2 previous rule and Motion In Limine.

3 THE COURT: Your objection --

4 MR. COOK: I'm talking about their publication --

5 THE COURT: I understand.

6 MR. COOK: -- to children.

7 THE COURT: I understand that. I've indicated my
8 ruling with regards to preemption and the Motion in Limine.
9 This is a continuing objection I understand. It is overruled
10 as long as we are talking about a -- what I -- as I
11 understand this document he's made reference to.

12 THE WITNESS: No, Mr. Cook, I don't believe we used
13 those precise words.

14 Q (by Mr. Cook) Do you -- do you in this document --
15 now, children are going to -- you -- you put this out to kids
16 with respect to whether or not they should smoke or not.
17 That's -- that's what it's for?

18 A Yes, sir.

19 Q And you -- and you discourage them?

20 A Yes, sir.

21 Q Now, what percentage of the market, the 15 million
22 or plus people who smoke in this United States are under the
23 age of 18?

24 A Mr. Cook, I don't have that information off the top

1 of my head.

2 Q Your marketing people have, don't they?

3 A No, our marketing people don't do research for that
4 age group. The government has some statistics and studies.

5 Q I mean, you have -- you have a marketing strategy
6 for your company, don't you?

7 A I hope so, yes, sir.

8 Q And you have marketing plans for your cigarettes,
9 don't you?

10 A Yes, sir.

11 Q And -- and 6,000,000 people, of course, would -- in
12 1979 would be a major part -- I believe there were about -- a
13 little -- 55, maybe 60,000,000 smokers at this point in time.
14 That would be 10 percent of your total market?

15 MR. CRIST: Objection.

16 THE WITNESS: I don't know what the statistics are,
17 Mr. Cook. I'm sorry.

18 THE COURT: His answer will stand.

19 Q (by Mr. Cook) Do you tell them in this publication
20 that you send out to these kids that 1,000 -- that the
21 Surgeon General says 1,000 people a day die from cigarette
22 smoking in this country?

23 MR. CRIST: Objection, Your Honor, this is all in
24 the preempted area. In addition to that, there's no duty to

1 warn on behalf of one of the defendants in this case. It's
2 irrelevant, immaterial.

3 MR. COOK: Are you making objections for the Tobacco
4 Institute?

5 MR. HEPLER: Well, of course. We'd join in that
6 objection. We have a standing objection.

7 MR. COOK: Well, I don't mind --

8 MR. HEPLER: We have a standing objection on the
9 point I thought.

10 THE COURT: I think they've indicated that that's
11 been clearly indicated on the record previously. It's just
12 being renewed at this time. As this document's being
13 described to the jury and to the Court, I'm finding it does
14 not fall within the preemption doctrine -- doctrine. So it's
15 overruled.

16 THE WITNESS: No, sir.

17 Q (by Mr. Cook) If you thought, B. Oglesby -- by the
18 way, they don't know that you go by your middle initial
19 rather than your first name. That's correct; is it not?

20 A Correct.

21 Q If you thought that that were true, that -- in other
22 words, that 360,000 people a year plus or minus 10 or 15,000
23 one way or another died from cigarette smoking, don't you
24 think that if you're trying to discourage children from

1 smoking that you ought to tell them in this publication
2 that -- that -- that that's the risk they're assuming?

3 MR. CRIST: Same objection, Your Honor.

4 THE COURT: Same objection is noted. Overruled.

5 THE WITNESS: Mr. Cook, I think you have to try
6 different things to get through to young people today. I
7 think young people are aware of the health risk associated
8 with smoking. I think everyone's aware of the health risk,
9 and I think the program that we developed was to try and go
10 at what we think is the principal reason for young people
11 smoking, which is peer pressure, you know, that it's not
12 cool, it's not the right thing to do. So that's -- I mean,
13 we do try different things to try and get through to young
14 people today.

15 Q (by Mr. Cook) Mr. Oglesby, I find that so hard to
16 believe because, Mr. Oglesby, with --

17 MR. HEPLER: Show my objection --

18 Q (by Mr. Cook) -- with all these smokers --

19 THE COURT: Sustained on your comment, Mr. Cook, as
20 to what you find hard to believe. Rephrase your question.

21 Q (by Mr. Cook) Sir, some way or another, you have to
22 replace those 300 -- the thousand smokers who die a day,
23 don't you?

24 MR. CRIST: Your Honor, object to the form of the

1 question.

2 THE COURT: Overruled. It's cross. Go ahead.

3 THE WITNESS: I'm sorry, I have trouble with the
4 number, Mr. Cook. Restate the question.

5 Q (by Mr. Cook) One of the reasons that you have
6 trouble with the number, and one of the reasons you don't
7 tell kids about the number, you don't believe it's been
8 established, do you?

9 MR. HEPLER: Show my objection --

10 Q (by Mr. Cook) Proven that cigarette smoking kills
11 people?

12 MR. HEPLER: -- to the form of the question. Your
13 Honor, show my objection --

14 THE COURT: He has to complete his question before
15 the objection. What is the objection?

16 MR. HEPLER: It's the argumentative nature of the
17 question and the manner in which it is being asked.

18 THE COURT: I'm going -- it's cross-examination. I
19 don't think we've gone over the line. I'm going to allow the
20 witness to answer the question.

21 THE WITNESS: Judge, could we restate the previous
22 question? There were two questions there, I believe.

23 THE COURT: She can read it back to you if you wish.

24 THE WITNESS: There was a first question and then

1 the follow-up question.

2 THE COURT: Okay.

3 (Whereupon, the Court Reporter read back the
4 following question:)

5 "Question: Sir, some way or another, you have to
6 replace those 300 -- the thousand smokers who die a
7 day, don't you?"

8 THE WITNESS: And my answer to that is no, sir.

9 Q (by Mr. Cook) You don't think they have to be
10 replaced?

11 A As smokers?

12 Q Yeah.

13 A No, sir.

14 Q What would happen to your business if they -- if --
15 if they stop?

16 A Mr. Cook, as you said, there are 50,000,000 smokers
17 out there. There -- there are a lot of smokers. We're in
18 the business of selling cigarettes to smokers, and we'd like
19 them to buy our product. That will continue to be the case
20 unless there's prohibition. I think there's always going to
21 be smokers.

22 Q And are you concerned that -- that -- that on --
23 with respect to the restrictions on smoking that you may lose
24 some business if there's -- if smoking's restricted on

1 airlines and public places and things like that?

2 A No, sir.

3 Q Do you remember the Ayatollah Khomeini?

4 A Yes, sir.

5 Q Do you remember him fondly?

6 A No, sir.

7 Q Let me read you a little bit of what -- do you know
8 -- you didn't know Horace Kornegay, did you?

9 A I have met him.

10 Q You have? Let me read you just a little bit about
11 what Horace said about the -- about the consequences of
12 smoking laws, and I'll read you a little bit more. This is
13 reading from Plaintiff's Exhibit 15H. Talks about -- refers
14 to Califano as the Ayatollah Califano. You don't know
15 Mr. Califano to have been a Muslim; do you, sir?

16 A No, sir.

17 Q He's talking about restrictive legislation on
18 smoking including education in children because the
19 consequences. "Consider this, if the pressure of anti-
20 smoking laws and regulations succeeds in stopping each
21 American smoker from lighting up just one cigarette a day,
22 the annual consequences are devastating.

23 Cigarette consumption would drop by more than 18
24 billion units. Personal spending for cigarettes would

1 decline by more than half a billion dollars." Just one
2 cigarette a day, and this is about 1980.

3 Now, this isn't the kind of thing that you're worried
4 about about restrictions. It's about one cigarette a day
5 stops smoking, and your industry loses a half a billion
6 dollars. That's not a matter of concern?

7 A Mr. Cook, I don't know the context that you're
8 talking about Mr. -- is this a speech? Is it a response to
9 something?

10 Q Why are you worried about the context? This is what
11 he said. Would you like to see what another man said in
12 Illinois? I'll refer you to Plaintiff's Exhibit No. 15G.
13 This is a statement by Mr. Ehringhaus in Illinois that was
14 made in 1973.

15 You'd have been here in Illinois in '73, would you?

16 A In transition to Illinois -- to -- Illinois to
17 Washington.

18 Q Mr. Ehringhaus who -- J. C. B. Ehringhaus who worked
19 for the Tobacco Institute stated this in Illinois at one of
20 the meetings of the Illinois Association of Candy and Tobacco
21 Distributors, "that there are approximately 7.5 million
22 adults in the State of Illinois of which the number 3,000,000
23 or so are smokers who in 1973 consumed about 140,000,000
24 cartons of cigarettes.

1 Now, if you were prevented from smoking say in a
2 meeting or a restaurant or a bus or anywhere, you don't delay
3 smoking that cigarette. You never smoke that cigarette."

4 You wouldn't know that because you've never smoked. I
5 can tell you that it's true. It is --

6 MR. CRIST: Objection.

7 THE COURT: Sustained.

8 Q (by Mr. Cook) And I'd like you to assume that for
9 purposes of this. "It is one less cigarette that you smoke
10 that day. Suppose every smoker in Illinois were to be placed
11 either by law or by being classed as a social outcast in a
12 position where he smokes one less cigarette per day. That's
13 15,000 cartons of cigarettes a day in Illinois. That's
14 5,475,000 cartons a year. Each of you knows his share of the
15 market in the State. You figure out what that means in loss
16 of profit to you in a year's time."

17 I want you to -- since you have been engaged in politics
18 to do a little mathematics with me. I believe Illinois,
19 what, we're down to 20 congressmen now; does that seem right
20 to you?

21 A We lost two.

22 Q We had 22.

23 A I thought we had 24.

24 Q Let's just assume for a minute that we have 20.

1 A All right.

2 Q You and I, and see if we can extrapolate this figure
3 of 5,475,000 cartons a year nationally if there's one less
4 cigarette smoked. There are 435 congressmen in the House of
5 Representatives in the United States; is that true, sir?

6 A Yes, sir. Yes, sir.

7 Q You know that from working there. And that if we
8 have 20, that would mean that we have -- well, that would be
9 20 into 435, that we have approximately -- actually a little
10 bit less than 5 percent of the congressmen in the United
11 States. That's seems about right, doesn't it? By looking at
12 that, 10 percent would be 43, you know, about 5 percent,
13 maybe a little more.

14 Okay. So that means if we take this figure of 5,475,000,
15 and we multiply it by 95, we would know if -- if
16 Mr. Ehringhaus is correct. We'd know generally throughout
17 the United States if one cigarette a day is dropped how many
18 cartons of cigarettes a year would not be smoked, according
19 to Ehringhaus's figures, right?

20 A I'm not sure I followed the math.

21 Q Okay.

22 A But, I mean, what's the 95, Mr. Cook?

23 Q This is Illinois' share.

24 A What's the 95?

1 Q Well, Illinois' only got 5 percent of the population
2 of the United States.

3 A Okay.

4 Q So -- so the remainder of it would be 95 times more,
5 right?

6 MR. HEPLER: Show my objection to the question.

7 THE WITNESS: I'm not sure the times is right.

8 MR. HEPLER: (A) It assumes facts not in evidence.
9 (B) deals with matters concerning consumption by other
10 states. Assumes consecrated assumptions improperly.

11 THE WITNESS: Not times.

12 MR. COOK: Uh?

13 THE WITNESS: I don't believe it's times.

14 MR. HEPLER: There's no fact to support that. It's
15 speculative and far field here, Your Honor.

16 THE COURT: The relevancy at this point is not clear
17 to me. If you feel you're confident you're going to tie it
18 up, I'll let you proceed.

19 MR. COOK: What I'm trying to do is generally -- I
20 guess he was wondering what the context of -- of -- of what
21 Kornegay said in 1980. I was going to show that there --
22 that if we had 5 percent of the population of the State of
23 Illinois -- of the United States, that -- that that means
24 that there would be 95 times that loss in the United States

1 which would roughly correspond with this figure.

2 MR. HEPLER: Show my objection again to the fact
3 that there's no evidentiary basis because consumption rate,
4 population, age bracket, all of that --

5 THE COURT: You've got a valid point, Mr. Hepler. I
6 don't think we can just divide these numbers and come up with
7 something.

8 MR. COOK: You don't think we can figure that out,
9 uh?

10 THE COURT: I think we can figure it out, but we
11 have to have a few more facts to give it any reliability.

12 MR. CRIST: Also object to the math.

13 THE COURT: I think it's speculative.

14 THE WITNESS: The math is in error.

15 MR. COOK: Would it be a good place to stop?

16 THE COURT: Excellent point. You have five left?

17 MR. HEPLER: I have eight left.

18 THE COURT: Okay, good. I was a little off. Okay.
19 And 1:30 is when your program starts, and you think you can
20 be back at approximately 2:30?

21 UNIDENTIFIED JUROR: Two thirty.

22 THE COURT: Would you shoot for that for us then?

23 UNIDENTIFIED JUROR: Yeah.

24 THE COURT: And would the rest of you please return

1 at 2:30. Could I see the attorneys at 2:00 with regards to
2 the exhibits and also the scheduling of witnesses.

3 MR. CRIST: We also had another matter, Your Honor.

4 THE COURT: Well, we'll sure use the half hour I'm
5 sure. We'll use it up. Two o'clock.

6 (The noon recess was taken.)

7 (Which were all of the proceedings taken by this
8 court reporter on this date.)

9 * * * * *

10 (The following portion of proceedings were reported
11 by Jean Lechowicz, CSR, License #084-003357, RPR.)

12
13 (Plaintiff's Exhibits No. 185 & 186 were marked for
14 identification at this time.)

15
16 (The following proceedings were had out of the
17 hearing and presence of the jury.)

18 MR. COOK: Your Honor, I plan on playing this just
19 like this.

20 THE COURT: What is the exhibit number?

21 MR. COOK: It's Exhibit No. 114A.

22 THE COURT: 114A, okay.

23 MR. HEPLER: Can we see it, Bruce?

24 MR. COOK: This what I plan on playing.

1 THE COURT: The court reporter needs to have a view
2 too because she's trying to take it down.

3 (At this time, Plaintiff's Exhibit No. 114A, a
4 videotape, was played in open court as follows.)

5 "MR. MERRYMAN: Anybody who sells a consumer product
6 is--

7 THE REPORTER: I can't hear it.

8 THE COURT: Turn it up, please.

9 "MR. MERRYMAN: --is going to look very closely at
10 who buys that product and then advertise to that group of
11 people.

12 SPEAKER: People who sell alcohol and cigarettes--
13 (At this time, there was a pause in the videotape.)

14 MR. MERRYMAN: Anybody who sells a consumer product
15 is going to look very closely at who buys that product and to
16 then advertise to that group of people.

17 (At this time, there was a pause in the videotape.)

18 MR. MERRYMAN: It doesn't make any sense to
19 advertise to the white collar retirees who mostly don't
20 smoke. You advertise to the area, the community, the
21 geographic and demographic group that uses the product.

22 SPEAKER: It is plain to see that the--"

23 (At this time, the videotape was concluded.)

24 MR. COOK: I muted some of it out of there, some

1 over-write by a announcer that Judge LeChien told me to mute
2 out of that.

3 THE COURT: Has Judge LeChien previously viewed this
4 tape and ruled on it?

5 MR. COOK: Yes, sir.

6 THE COURT: What is--

7 MR. COOK: What I played there is what Judge LeChien
8 said I could play.

9 MR. GOOLD: I'm not so sure, Your Honor.

10 MR. HEPLER: I know that's not true in terms of what
11 that announcer was saying.

12 MR. COOK: I took the announcer out. Oh, I'm not
13 going to start with Vareen. It starts Vareen.

14 THE COURT: Can I ask you, again that was Exhibit--

15 MR. COOK: --114A. We talked about it twice.

16 THE COURT: And is there a description of that?

17 MR. COOK: It's Merryman advertising in
18 Philadelphia, is what-- If you reach Vareen, V-a-r-e-e-n, it
19 will kick it up.

20 THE COURT: Okay, let me see one thing here. Would
21 you give me that spelling again?

22 MR. COOK: V-a-r-e-e-n.

23 THE COURT: V-a-r-r-e-n?

24 MR. CRIST: V-a-r-e-e-n, I think is what Mr. Cook

1 said.

2 THE COURT: I didn't get that.

3 MR. COOK: How about 114A or 114? 114 is modified
4 114 something.

5 MR. GOOLD: Judge, I believe the rule we've been
6 following is that statements by a party witness have been
7 played, and I guess that would include advertisements by the
8 parties. But where you're talking about voice-overs by a
9 narrator, that's excludable as hearsay.

10 Also in this tape you've got the situation where there's
11 background shots which were not generated by the Tobacco
12 Institute or Reynolds, but were generated by whomever was
13 assembling this program.

14 At transcript 2488, Judge-- 2489, I'm sorry, Judge
15 LeChien cited the parties to a case which he read-- pertinent
16 portions of which he read into the record. And if you can
17 punch up 2489, you'll see it.

18 THE COURT: What's the name of the case?

19 MR. GOOLD: The case is Missouri Portland Cement
20 Company verses Lime Gypsum and Allied Workers International
21 Union, 145 Ill. App. 3rd, 1023. May be I should have given
22 you that cite.

23 THE COURT: That's all right. I've got it.

24 MR. GOOLD: Okay. There is language specifically

1 dealing with the circumstances under which a videotape may be
2 displayed. And what it requires is that the videotape be
3 identified by a witness as a portrayal of certain facts
4 relevant to a particular issue and verified by that witness
5 with personal knowledge as to-- as a correct representation
6 of the facts.

7 So far as the background shots are concerned on the
8 videotape we just saw, I don't believe there is any such
9 witness. You were talking about something that was
10 apparently assembled by some television producer or crew who
11 we don't know and will never have the chance to learn about
12 as to whether it's a correct representation, whether it was
13 staged, just what is being displayed.

14 MR. COOK: We've been through this about twenty
15 times. The man who's talking is Walker Merryman. The
16 purpose of putting the-- the-- the advertisement in there is
17 to show the Virginia Slim advertisement in a poor community
18 tailored to black people. It's just exactly for that
19 purpose.

20 There are two purposes: One to say what he says and one
21 to say that they advertise in this nature. Now Walker, I
22 guess, can't say what-- how Philip Morris advertises. But
23 Philip Morris, and I'll bring them in to identify it if need
24 be, Walker was on a program, the entire program, this program

1 is cut down, had to do with Louis Sullivan's attack on the
2 tobacco-- on R.J.R. for the-- for Uptown Cigarettes, a
3 cigarette that they marketed and targeted black people. And
4 that portion of it, all of that has come out of this per
5 Judge LeChien's request. And then the last voice-over, Judge
6 LeChien took out too.

7 Now Judge LeChien has indicated-- on the other hand, if I
8 find 114 proper, I'll clear the whole thing for the Court.
9 I don't see anything that's error in there, and I do see
10 Merryman's statement--

11 MR. HEPLER: Your Honor-- I'm sorry, Bruce, were you
12 done?

13 What we have here is, you know, Judge LeChien is-- we
14 went through this, God, it seems like item for item we went
15 through this. And the substance, as I understand the
16 position of the ruling, was certainly Walker Merryman is
17 someone who's voice could be played and his view could be
18 displayed. But the background shots is-- now advertising may
19 be something he might be able to play, but he can't play, you
20 know, pictures of the smokers walking along smoking. He
21 can't play the commentary with regard to that, and the
22 reason's very simple. You know, it is like a photograph.
23 You can't demonstrate the authenticity of this film clip.

24 Now, that's a different question with regard to, you

1 know, a particular advertisement that's on-- been run by one
2 of the companies. It's different with regard to a statement
3 by one of the members of a company or a party defendant here.
4 But that's not-- does not allow him to go into showing scenes
5 of people who are smoking in the black community and walking
6 along and trying to play that as accurate when he has no
7 basis for that, and there's no one that can have a basis. We
8 don't know what they cut out or what they did. We can't
9 address those points.

10 MR. COOK: It is hearsay, but I'm not trying to
11 prove it. I mean, we've been through this a dozen times.

12 MR. HEPLER: I know and--

13 THE COURT: If he's ruled on it, is it actually in
14 the transcript right here where you've cited it to me?

15 MR. HEPLER: What we ended up doing was just what I
16 said we'd been doing, and that is wants Walker Merryman to
17 come in or somebody else to come in.

18 And, Bruce, you know that. And we've played ads. We
19 haven't fought about those ad problems. But you can't do
20 voice-overs and--

21 MR. COOK: Well, I want to play this one. And I
22 mean Judge LeChien ruled that I could play it. I want to
23 play it for this man. I don't care if you've got a problem
24 with it, you edit it. You know, I mean--

1 Judge, hearsay is when you try to prove the truth of a
2 matter by something that exists. If you don't have Merryman,
3 listen to what Merryman says.

4 MR. HEPLER: Well, Bruce--

5 MR. COOK: I think it's relevant to listen to what
6 he says again, and I'll allow the part that I muted out over.

7 (At this time, Plaintiff's Exhibit 114A, a
8 videotape, was played in open court.)

9 "MR. MERRYMAN: Anybody who sells a consumer
10 product--

11 MR. COOK: That's Merryman.

12 MR. MERRYMAN: --is going to look very closely at
13 who buys that product and then advertise to that group of
14 people.

15 SPEAKER: Alcohol and cigarettes there is no down
16 side. They are simply selling to the people who are most
17 likely to buy."

18 MR. COOK: That's cut out.

19 "MR. MERRYMAN: It doesn't make any sense to
20 advertise to white collar retirees who mostly don't smoke.
21 You advertise to the area, the community, the geographic and
22 demographic group that uses the product.

23 SPEAKER: It is plain to see that the--"

24 MR. HEPLER: See, the problem is the authenticity of

1 those shots behind that. He still must have someone to
2 demonstrate--

3 MR. COOK: All right. Here, I'll put Merryman back
4 on the stand, and I'll ask Merryman whether he was on a
5 program about-- about-- if you want me to, about advertising
6 directed towards black people and Louis Sullivan and Uptown,
7 and we'll put it all in.

8 Now, I thought that this had been cut to the point that
9 you wanted it. I'll do a whole lot with it if you want me
10 to.

11 MR. CRIST: Your Honor, let me make my objection in
12 addition to those which have already been made. I object to
13 once again injecting unnecessarily into this case racial and
14 other prejudices. I don't think they have any part in this
15 case. The jury has already seen this. All Mr. Cook wants to
16 do is to use it to once again inflame the passions of the
17 jury. It has no place in this case.

18 In addition to that, Your Honor, it has absolutely no
19 relevance and absolutely no materiality to anything which is
20 genuinely in issue in this case. And finally, I submit that
21 it's pre-empted.

22 THE COURT: Did the jury already see this tape?

23 MR. CRIST: Yes, they did, Your Honor. They saw it
24 in that form.

1 I think Judge LeChien heard, for the reasons that Mr.
2 Helper has set forth, that they've seen it in that form. Why
3 do they have to go through it again?

4 THE COURT: Well, let's just take one moment and
5 think everybody. Have they seen it or not?

6 MR. CRIST: Yes, they have.

7 THE COURT: Okay. Well--

8 MR. CRIST: That's my recollection that they've seen
9 it.

10 MR. COOK: Well then I can play it again.

11 MR. HEPLER: I think you're wrong, Paul.

12 MR. COOK: Paul, Paul, I assure you absolutely that
13 you're wrong.

14 MR. CRIST: May be it's because I've seen it so many
15 times.

16 MR. HEPLER: And that's right.

17 MR. COOK: We edited it three different times with
18 Judge LeChien.

19 The point is let me tell you what the relevance is so
20 that we go through this again and nobody misunderstands.
21 What is the relevance of them advertising to children? Now,
22 why do I ask them questions about that, why do I ask them
23 questions about do they target black people because they say
24 they don't? And that has to do with whether or not they're

1 telling-- it has to do with their credibility.

2 Right now this man right here from R.J.R. says that the
3 tobacco industry doesn't target poor people.

4 MR. CRIST: He did not say that.

5 MR. COOK: The hell he didn't.

6 MR. CRIST: He did not say that. He said we do
7 target different demographic groups.

8 MR. COOK: He also said they didn't. He said almost
9 everything. He also said that, Paul. Your recollection is
10 not as good as it could be.

11 MR. CRIST: He did not say that.

12 MR. COOK: He says that you don't target children,
13 and you know very well that you do.

14 MR. CRIST: That's an absolute lie.

15 THE COURT: Hold on. Now let's-- the only thing
16 about-- could we stop the tape after he's done with his final
17 comments? It's only the last second.

18 MR. COOK: Yeah, I'm going to hit the mute just
19 exactly at that point.

20 MR. HEPLER: May I offer, Your Honor, what I thought
21 was in line with what we've been doing was that certainly
22 he's entitled to show the statement that Mr. Merryman is
23 showing. What I don't believe that he is entitled to and
24 what I think is in line with what we were following with

1 Judge LeChien's orders was any of the voice-overs for the
2 clips of scenes that are shown before or after Mr. Merryman's
3 comment because there can be no authenticity. I don't
4 quarrel with his right to show Mr. Merryman's voice and what
5 Mr. Merryman said. But the beginning before that and after
6 that, I believe that he cannot show it.

7 THE COURT: Let's play it again.

8 (At this time, Plaintiff's Exhibit No. 114A, a
9 videotape, was played in open court.)

10 "MR. MERRYMAN: Anybody who sells a consumer product
11 is going to look very closely at who buys that product and
12 then advertise to that group of people."

13 THE COURT: That was Merryman.

14 (At this time, there was a pause in the videotape.)

15 "MR. MERRYMAN: It doesn't make any sense to
16 advertise to the white collar retirees who mostly don't
17 smoke. You advertise to the area, the community, the
18 geographic and demographic group that uses the product."

19 (At this time the videotape was concluded.)

20 MR. CRIST: Now, what they've done is they've taken
21 Mr. Merryman's voice and put it into a context that we can't
22 verify that was even in there.

23 MR. COOK: Well, he's here. You can talk to him.

24 MR. GOOLD: But it's not Mr. Merryman's program. He

1 can play Mr. Merryman speaking and he can show the portion in
2 which Mr. Merryman is shown on the screen.

3 MR. COOK: I understand that, and that gives the
4 context to what he has to say and that's what the program was
5 about. The program was about advertising targeted towards
6 black people. That's exactly what it's about, and it's also
7 about the fact that you don't advertise to white, middle
8 class people. You don't advertise in the country club, but
9 you really let them have it in East St. Louis or around the
10 golfers.

11 MR. GOOLD: Your Honor, and that's precisely why--

12 THE COURT: Well, wait a minute. What about this,
13 Mr. Cook? You would not contend that this artistic form that
14 we have here that the editor or the producer or director or
15 producer of this wasn't making some type of public statement
16 by what pictures he choose or what he decided to depict if in
17 fact he was--

18 MR. COOK: I think that he does.

19 THE COURT: He is not here subject to cross
20 examination.

21 MR. COOK: That's true, but then I'm not offering it
22 for the proof of that.

23 THE COURT: I know you're not, but clearly--

24 MR. COOK: Mr. Merryman is here and--

1 MR. CRIST: But--

2 THE COURT: Let him finish. Go ahead.

3 MR. COOK: Mr. Merryman is here and he was on the
4 program when he made those comments that was discussing black
5 people-- I think the best thing for me to do is just put Mr.
6 Merryman back up.

7 MR. HEPLER: The problem is-- let me address that
8 for a moment though, Your Honor. The problem with that is
9 Mr. Merryman can say "I was sitting in my office and I was
10 asked questions and I gave these statements".

11 MR. COOK: True, and he can give it a context.

12 MR. HEPLER: But I can't say that the film clips
13 that the editors of this particular program decided to use--

14 MR. COOK: I'll put Merryman on there and I'll--

15 MR. HEPLER: And--

16 MR. COOK: --and I'll turn it back from them and
17 they can listen to what he says. And I'll say, "Now, you
18 were on this program concerning Uptown and the concern was in
19 the program was about your efforts in advertising directly
20 targeted toward black people, is that correct?" And he'll
21 say "Correct". And I'll turn the back of that thing to them
22 and the jury can hear what he's got to say. That will be
23 good.

24 THE COURT: But they won't see it?

1 MR. COOK: But they won't see it.

2 MR. HEPLER: And you don't have to put him on to do
3 that.

4 MR. COOK: Oh, yes, I do because is that's what's
5 here, the portion of this, is that it gives them a context.
6 And that's the reason Judge LeChien tightened me down so much
7 is that he said, "Yes, you're not trying to prove that those
8 people smoke." He thought that I could put in the two
9 Virginia Slims ads just as examples of advertising that is
10 targeted towards black people. But it gives it a context. I
11 think it's nice.

12 THE COURT: It is nice, and as you've indicated many
13 times somethings do more than one thing, and it not only
14 gives a context but it also reflects--

15 MR. COOK: Judge, I didn't mean for you to remember
16 that.

17 THE COURT: Okay. Sustained. We can go into--

18 MR. COOK: I'll bring Merryman back up.

19 THE COURT: It's your choice technically.

20 MR. COOK: Sure. I haven't picked on him for awhile
21 anyway.

22 THE COURT: Okay. Now let's think where we're at.
23 We have got a few minutes before the jury gets in. We're
24 trying to stay on a schedule of ending this trial as we

1 talked about before considering our Christmas vacation.

2 Do you want to talk about the 237's, Mr. Crist?

3 MR. CRIST: Yes, Your Honor. We've got like eight
4 people who are stacked up waiting to testify and--

5 THE COURT: Who have you got?

6 MR. CRIST: Well, we've got B. Ogelsby now on the
7 stand, Peggy Carter, Sam Simmons, Tom Griscom, Yancy Ford and
8 Burleigh Leonard.

9 THE COURT: And these are people that all are here
10 in town from out of town waiting?

11 MR. CRIST: Because they've been targeted to come in
12 at certain points in time, and they're all waiting. Some of
13 them were here last week, Your Honor.

14 THE COURT: Mr. Cook, I know it's your intention to
15 move this case on as expeditiously as you possibly can, and
16 it's my intention to try to inconvenience both sides as
17 little as possible.

18 MR. COOK: Your Honor, I would think that Ms.
19 Carter, Mr. Griscom and Ms. Leonard and Mr. Ford are all
20 going to be very short witnesses. I would think that Mr.
21 Simmons would tend to be just a bit longer, but I anticipate
22 finishing up tomorrow.

23 THE COURT: Excellent. That gives us a good focus
24 on where we're going.

1 MR. COOK: That's if they don't spend half hours up
2 at the side bar.

3 THE COURT: We're just going to go with what we've
4 got, but that sounds a lot better. It gives you a lot more
5 range to work in I think there. Good. Okay.

6 (Discussion held off the record.)

7 THE COURT: Okay. Besides that, as part of all this
8 housekeeping thing, I do want to make a concerted effort to
9 get an inventory of every exhibit we've got, the status of
10 that exhibit, whether it's been offered or marked or
11 whatever, so we've got something comprehensive where we're
12 each working off of every morning. We are running into a
13 problem of duplicate numbers on exhibits, which we don't want
14 to continue to occur.

15 So, Mr. Hepler, you've got a list on the way. Mr. Cook
16 was going to send somebody from his office to also work with
17 us.

18 Okay. Is there anything to do now before we start at
19 2:30?

20 MR. STUHAN: We do have a couple of matters that we
21 need to talk about, but I don't think we can do either of
22 them in two minutes time.

23 THE COURT: Is it that late? Okay.

24 MR. STUHAN: One is we need to get the Court to rule

1 on the remainder of our objections to portions of the Dr.
2 Best deposition. My guess is that ought to take about
3 fifteen, maybe twenty minutes.

4 And I was also wondering, Your Honor, where we stand with
5 respect to jury trial in the Consumer Fraud Act claim.

6 MR. COOK: I also would like the Court to rule on my
7 motion to file the sixth amended complaint.

8 MR. HEPLER: We have an objection.

9 MR. GOOLD: Your Honor, I brought over a memorandum
10 in opposition. I would like to file that now, Your Honor.

11 MR. CRIST: We would like to file ours too. We
12 don't have it with us.

13 MR. COOK: I brought it to everybody's attention
14 that I was going to do this in the mid-week last week.

15 And have you seen the sixth amended, Judge?

16 THE COURT: No.

17 MR. COOK: It's up there somewhere.

18 THE COURT: I'm sure it is. I'm going to study it
19 along with the memorandum tonight, and I don't want to take
20 any time away from our testimony this afternoon. 8:30 in the
21 morning. I'll have the jury come in at 9:30, and we can get
22 an hour in, and we'll start just at the top of the list, work
23 our way down, try to catch an hour every morning.

24 Okay. Everybody get a drink. I'll check on the jurors

1 and we'll start right away.

2 (Recess taken.)

3 (Plaintiff's Exhibit No. 187 was marked for
4 identification at this time.)

5 (The following proceedings were had out of the
6 hearing and presence of the jury.)

7 MR. GOOLD: Judge, during the recess Mr. Cook has
8 indicated during Mr. Ogelsby's testimony he intends to
9 inquire concerning the dues Reynolds pays T.I. And under the
10 order in limine by Judge LeChien, T.I. is provided the
11 opportunity to object to such evidence outside the presence
12 of the jury before it may be admitted.

13 Your Honor, we would object to the introduction of such
14 evidence on relevance and materiality grounds. It has no--
15 It doesn't inform the jury of anything. We just believe it
16 should be excluded.

17 THE COURT: Any comment, Mr. Cook?

18 MR. COOK: No, sir, we've been through this; not
19 with you.

20 THE COURT: Would you like to enlighten me? I mean
21 is it a long dissertation or can you fill me in?

22 MR. COOK: It has to do-- I believe Judge LeChien
23 said he was going to let me do it, that this is a case for
24 punitive damages and the net worth of the Tobacco Institute

1 is germane here in terms of the punitive damages.

2 Further, in terms of the conspiracy, it would be
3 evidentiary of the amount of money that R.J.R. pays and the
4 other co-conspirators pay in search for their improper role.

5 THE COURT: All we're talking about is the dues that
6 they pay right now, is that it?

7 MR. COOK: I was talking about their annual
8 assessment which is sixteen million dollars to the Tobacco
9 Institute, what they pay into the Tobacco Institute for the
10 Tobacco Institute to do it and then what the Tobacco
11 Institute's total budget is in terms of their net worth, what
12 the other co-conspirators pay.

13 THE COURT: Are there dues factored on a percentage
14 of their net worth, is that it?

15 MR. COOK: Their dues are factored, as I understand
16 it, on their market share.

17 MR. GOOLD: Like almost any trade association, it's
18 a market share type form of--

19 THE COURT: Well, it could well be.

20 MR. COOK: There is a possibility.

21 THE COURT: I guess we'll cover that in the direct.
22 I'm going to overrule the objection. Okay. Fine. I don't
23 want to loose this. I'll bring it back. Okay. We're still
24 checking on the one lady right now.

1 (Plaintiff's Exhibits No. 188 & 300A were marked
2 for identification at this time.)

3
4 (The following proceedings were had in the
5 presence of the jury.)

6 THE COURT: Okay, let's continue.

7 MR. COOK: Your Honor, in order to lighten the
8 proceedings a little bit, can I start off with a few--

9 THE COURT: What is the exhibit number?

10 MR. COOK: That's what I'm--

11 THE COURT: --checking for.

12 MR. COOK: The exhibit number is 114.

13 THE COURT: 114.

14 (The examination of Mr. Marian Ogelsby by Mr. Cook
15 continued as follows.)

16 Q. (Mr. Cook) Mr. Ogelsby, you're old enough to
17 remember when commercials were on television, aren't you?

18 A. Yes, sir.

19 Q. Cigarette commercials?

20 A. Yes, sir.

21 Q. Unfortunately so am I or else fortunately.

22 I'm going to play a couple for you and the jury just to
23 get you in the proper mood.

24 (At this time, a videotape was played in open court

1 as follows.)

2 "MALE SPEAKER: Winston tastes good like a cigarette
3 should.

4 FEMALE SPEAKER: You mean as a cigarette should.

5 MALE SPEAKER: What do you want, good grammar, good
6 taste?

7 FEMALE SPEAKER: I want to go where there are no
8 pigeons.

9 MALE SPEAKER: Pardon, but Winston tastes good like
10 a cigarette should.

11 MALE SPEAKER: Winston may not say it right but they
12 sure know how to make it right.

13 MALE SPEAKER: Anybody seen my T-shirt?"

14 (At this time, the videotape was concluded.)

15
16 (At this time, a second videotape was played in open
17 court as follows.)

18 "MALE SPEAKER: Winston tastes good like a cigarette
19 should.

20 FEMALE SPEAKER: You mean as a cigarette should.

21 MALE SPEAKER: What do you want good grammar or good
22 taste?

23 FEMALE SPEAKER: I want you to take out the garbage.

24 SPEAKERS: Pardon the grammar but Winston tastes

1 good like a cigarette should.

2 FEMALE SPEAKER: Winston may not say it right but
3 they sure know who to make it right, King.

4 MALE SPEAKER: Or Super King.

5 (At this time, the videotape was concluded.)
6

7 Q. (Mr. Cook) With respect to the advertisement of
8 cigarettes when you were a youngster, when you were fourteen
9 or fifteen years old, did the cigarette industry to your
10 knowledge make any warnings that cigarette smoking might
11 cause cancer, cause emphysema, heart problems, things of that
12 nature?

13 A. Well, I was certainly aware of health risks when I
14 was growing up. I don't know exactly how I was aware of
15 that, whether it was through church or school or--

16 Q. You don't know if the cigarette industry did or
17 not?

18 A. No, sir.

19 Q. Are you familiar with the cigarette advertising
20 code?

21 A. Yes, sir.

22 Q. What is the nature of your familiarity, sir?

23 A. I'm familiar that for several years the industry's
24 had a voluntary code that deals with advertising and

1 promotion practices.

2 Q. Have you-- just so that I get some-- have you have
3 occasion to look into that recently?

4 A. Yes, sir.

5 Q. For purposes of testifying here?

6 A. No. In other words, in 1990 I believe it was
7 modified, and I was aware of discussions-- '89 or '90-- I was
8 aware of discussions concerning it then.

9 Q. You haven't reviewed then the advertising code for
10 purposes of testifying here.

11 A. No. I'm aware of the advertising code. I've read
12 it, but I haven't--

13 Q. I didn't ask you this, but have you reviewed
14 things prior to testifying here, Mr. Ogelsby?

15 A. What do you mean by review things?

16 Q. Well, I took your deposition some months ago. Did
17 you have a chance to look at that?

18 A. Yes, I looked at the deposition.

19 Q. Have you looked at anything else?

20 A. In terms of documents, the only document I looked
21 at was during the deposition there was a document that you
22 and I had trouble reading. I asked for a copy of that. I
23 read a copy of that.

24 That's the only document I've look at, sir.

1 Q. I believe I have blown up here-- that document
2 starts off "A frank statement to smokers".

3 A. I believe that's correct.

4 Q. And you're aware of the fact that that was
5 published in four hundred forty-eight newspapers in the
6 United States in 1954.

7 A. I wasn't aware of that fact.

8 Q. Are you aware of the fact that in 1954 that the
9 Readers Digest published an article that they said that the
10 causal relationship between cigarette smoking and the article
11 and cancer, lung cancer, had been established? Were you
12 aware of that?

13 MR. CRIST: Objection, Your Honor, it misstates the
14 evidence.

15 MR. HEPLER: Hearsay and materiality and relevance,
16 Your Honor.

17 THE COURT: In regards to the objection of
18 misstating the evidence, do you--

19 MR. CRIST: In addition to that, the exhibit just
20 came in for a limited purpose only, Your Honor.

21 THE COURT: Are you checking your reference on that?

22 MR. COOK: I don't think that I misstated the
23 evidence, Your Honor. I'd like for him to point out how. I
24 mean this document's been read to the jury.

1 THE COURT: Are you quoting from the document?

2 MR. COOK: No, I wasn't quoting from the document.
3 I was paraphrasing.

4 MR. CRIST: What you said isn't what it says.

5 MR. COOK: Well then perhaps you can straighten that
6 out.

7 THE COURT: Is there-- you're going to have to-- I'm
8 either going to have to have it read back or ask you to
9 repeat exactly what the question was. Do you want me to have
10 it read back or do you want to repeat it?

11 MR. COOK: Excuse me.

12 THE COURT: I just have to be clear on what you
13 said. I don't remember exactly what you said.

14 MR. COOK: Well fine, then read it back.

15 THE COURT: Okay. What did you say?

16 MR. COOK: Oh, I was going to ask it be read back.

17 THE COURT: Okay. I think we finally got there.
18 Can you go back and read that back to me?

19 (The reporter read back the last question.)

20 THE COURT: How would you correct his
21 representation?

22 MR. CRIST: The article doesn't come anywhere close
23 to saying that, Your Honor. It goes through and discusses a
24 couple of studies. It quotes the American Cancer Society of

1 taking the position that justifies a suspicion. That it does
2 to a degree not yet determined increase the likely
3 development of lung cancer. And concludes by saying that
4 people have got to make their own choice.

5 THE COURT: Okay.

6 MR. CRIST: Nothing in here about being established
7 in 1954.

8 MR. COOK: Perhaps I'll read a portion of it.

9 Q. (Mr. Cook) Were you aware of the fact that in
10 Readers Digest in 1964 that there was published on Page 3 of
11 the Facts Behind the Cigarette Controversy, "From 1948 to
12 1952 Dr. Richard Doll and A. Bradford Hill interviewed nearly
13 five thousand patients in British hospitals? Out of 1,357
14 men with lung cancer, all but seven were smokers. Dr. Doll
15 and Hill concluded smoking is a factor, an important factor
16 in the production of cancer of the lung?"

17 Were you aware of that?

18 MR. CRIST: Objection, Your Honor, to the form of
19 the question. I also object to its hearsay nature.

20 MR. COOK: I thought you wanted me to read it.

21 THE COURT: No, it's overruled. You can answer the
22 question. It asks whether you were aware of that, was simply
23 the question.

24 THE WITNESS: No, sir.

1 Q. (Mr. Cook) With respect to your advertising code,
2 we have-- you've had occasion to read the advertising code
3 recently. I think that after you look at this statement--
4 can you read that from there, sir? I'm referring to
5 Plaintiff's Exhibit No. 12B. That is if you read this
6 paragraph here, that you'll see that most of the things in
7 the paragraph are contained in the 1990 advertising code.

8 A. I'm trying to work my way through it.

9 Q. Sure.

10 A. Yeah, that would--

11 Q. Does that pretty well reflect the advertising code
12 right now?

13 "It is the intention of the cigarette manufacturers to
14 continue to avoid advertising directed to young persons, to
15 abstain from advertising in school and college publications,
16 not to distribute sample cigarettes or engage in promotional
17 efforts on school and college campuses, not to use
18 testimonials from athletes or other celebrities who might
19 have special appeal to young people, to avoid advertising
20 which represents that cigarettes smoking is essential to
21 social prominence, success or sexual attraction, and to
22 refrain from depicting smokers engaged in sports or other
23 activities requiring stamina or conditioning beyond those
24 required in normal recreation."

1 Now the date of this publication in Plaintiff's Exhibit
2 No. 12B, sir, was published by the Tobacco Institute in
3 February of 1973.

4 I wonder if you agree with the second page of this.
5 "That the manufacturers made the offer, Cullman said--
6 talking about removing it from T.V.-- because they recognized
7 that the broadcast media--

8 A. I'm sorry, is this a continuation of this first
9 page?

10 Q. Yes, sir. The only part that I'm kind of
11 interested in here is that--

12 A. I didn't-- I'm sorry, I didn't finish the first
13 page.

14 Q. That television had a unique appeal to young
15 people, do you agree with that?

16 A. No, I think television has a broad appeal to
17 everybody from a marketing standpoint, if that's what you're
18 talking about.

19 Q. So then this statement by the Tobacco Institute,
20 you disagree with that?

21 A. This particular point of your question, I don't
22 necessarily think that-- television has appeal, if you're
23 talking about for marketing purposes, to a broad cross-
24 section of people.

1 Q. The statement goes on as you read it, "Young
2 people--

3 A. I haven't gotten to the rest of it.

4 Q. I'm going to try and help you with it.

5 A. Okay. All right.

6 Q. "Young people are exposed to broadcast advertising
7 differently than they are to print advertising." You agree
8 to that.

9 A. It's a different medium, sure.

10 Q. Kids, nine, ten-year-old kids don't read Life
11 Magazine, Time Magazine too much; some may. But they
12 unfortunately seem to spend quite a bit of time glued to the
13 television set.

14 "It is well known that young people spend a great deal of
15 time viewing television and listening to radio." That's
16 true, isn't it, more so than you and I, I hope?

17 A. Absolutely.

18 Q. "It takes an affirmative act on the part of the
19 viewer or listener to avoid broadcast advertising. By
20 contrast, much less time is spent by young people in reading
21 newspapers and magazines and an affirmative act is required
22 by the reader to see and comprehend such advertising."

23 So, do you agree with that then?

24 A. I'm sorry, Mr. Cook, let me finish. The statement

1 I don't have any particular quarrel with. Your question I
2 didn't agree with.

3 Q. Okay. Well then you don't-- I mean it says that
4 up here that television had a unique appeal for young people,
5 and then they explain the unique appeal. And that is is that
6 really basically young kids, seven, eight, nine, ten-year-old
7 kids, children who are learning how to read, don't read
8 newspapers, but they do watch television. They watch way too
9 much, most of us think.

10 Do you agree with that?

11 A. They watch television. That wasn't your question.
12 That was the only thing I was getting to.

13 Q. I thought it was.

14 Now, I wanted to ask you about the advertisement portion
15 of this-- about testimonials from athletes and other
16 celebrities. Your voluntary code prevents that. Is that
17 because is that the athlete or the celebrity might be
18 considered as a role model for a child?

19 A. Mr. Cook, my thought is or understanding is that
20 that's not the case, but that we recognize that there's been
21 a lot of controversy surrounding advertising and that using
22 athletes or celebrities just adds to the controversy.

23 Q. So, you didn't enter into this code. You just do
24 that. You don't do it because-- because you think that

1 athletes or celebrities attract people to purchase products.

2 A. Mr. Cook, I don't know the history of involving
3 all of these elements of the code. I was trying to respond
4 to your question.

5 Q. Well, I'm just trying to ask you what you think
6 now. I know that you don't know why they enacted this code
7 in 1962 or '3. I do know that-- that people who advertise
8 products use athletes and pay them enormous amounts of money
9 to advertise their products. You're aware of that too,
10 aren't you?

11 A. Yes, sir.

12 Q. That those people who are athletic stars,
13 especially-- I guess the most graphic example is that the
14 tennis shoe people-- the tennis shoe, they don't even call
15 them tennis shoes anymore. But the athletic shoe people hire
16 all of the-- Nike hires Michael Jordan. Puma hires who have
17 you and-- to advertise their products. Pepsi Cola and Coca
18 Cola use Michael Jackson and-- I can't think of her name, the
19 girl who does that.

20 A JUROR: Paula Abdul.

21 Q. (Mr. Cook) Paula Abdul. Have you seen that great
22 Paula Abdul ad where she dances with Gene Kelly?

23 A. Yes, sir.

24 Q. That's really nice. That's good, isn't it, for

1 old guys like that?

2 A. Yes, sir.

3 Q. You understand that they pay a lot of money to
4 those people to advertise those products.

5 A. Yes, sir.

6 Q. Okay. But you won't do that.

7 A. Today that's correct. We don't use athletes or
8 celebrities.

9 Q. But you know I-- and-- and-- and you don't want to
10 use-- "To refrain from depicting smokers engaged in sports or
11 other activities requiring stamina or conditioning beyond
12 those required in normal recreation." Why do you think that
13 you have that?

14 A. I'm not sure, Mr. Cook.

15 Q. It isn't because of the FTC charges in 1943, is
16 it?

17 A. I don't know that, sir.

18 Q. Okay. Do you agree that it would be improper to
19 do that, to depict smokers engaged in sports or other
20 activities requiring stamina or conditioning beyond those
21 required in normal recreation?

22 MR. CRIST: Object, Your Honor, pre-empted.

23 MR. HEPLER: Objection, speculation and conclusion.

24 THE COURT: I think you are getting into a pre-

1 emption now, Mr. Cook.

2 MR. COOK: Your Honor, with respect to the Tobacco
3 Institute-- and this is one of their publications-- there's
4 nothing pre-empted with respect to the Tobacco Institute.

5 THE COURT: You're limiting this to the Tobacco
6 Institute, and this man is on the board now.

7 MR. COOK: That's true. And in addition to that,
8 Your Honor, is that there is no pre-emption if the
9 advertisement is deceptive, which I think that any
10 advertisement in this regard would be, but this is 1973.

11 THE COURT: 1973, correct.

12 MR. COOK: Sure.

13 THE COURT: The objection of Reynolds is sustained.

14 Q. (Mr. Cook) With respect to this information here,
15 can you agree with me that an advertisement-- that probably
16 the reason for a prohibition on advertisement showing smokers
17 engaged in sports or other activities would be because it
18 might make people think that if you do those type of
19 activities that smoking might help you do them?

20 MR. HEPLER: Your Honor, show my objection. It
21 calls for the witness to speculate. It calls for him to draw
22 a conclusion. He's not been established as an advertising
23 expert, no foundation in that regard. The Tobacco Institute,
24 who he's directing this to, is not engaged in advertisement.

1 MR. CRIST: Your Honor, pre-empted.

2 THE COURT: Pre-emption. Okay. The jury's heard
3 the witness' background. I think there's sufficient
4 qualifications to make a comment if he has one. The jury
5 would place the proper weight on it.

6 Now, if you have an answer, you can give it.

7 MR. CRIST: Your Honor, can we approach on this?

8 THE COURT: Sure, come on up.

9 (The following proceedings were had at the bench out
10 of the hearing of the jury.)

11 THE COURT: We're on the record. We were talking
12 about the issue of comparative fault. So, you're telling me
13 now you're putting in evidence from which the jury can infer
14 fault on your client?

15 MR. COOK: No. That they can infer that the fault
16 on my client, that he was encouraged by them to think that
17 smoking assisted them with performing some things that he
18 does. Specifically, Your Honor, the Winston cup things. My
19 guy is an absolute manic on the Winston cup. That has to do
20 and is probative of the fact if they suggest-- I'll get into
21 it appropriately here, and you'll see.

22 THE COURT: Would you quote from it, please?

23 MR. CRIST: Your Honor, it's-- Cipollone deals with
24 failure to warn and then it moves in and deals with

1 fraudulent misrepresentation. And what it says is that there
2 are two different kinds of fraudulent misrepresentation. One
3 is common fraud. We don't have that in this case. Mr. Cook
4 had a claim. He dismissed it.

5 The other form of fraudulent misrepresentation, the
6 Supreme Court held is pre-empted, and they specifically deal
7 with an example which is almost precisely that Mr. Cook is
8 asking this witness about. It does it by analogy. It talks
9 about the FTC proposal in 1964. And they found that the
10 concepts that Mr. Cook is now dealing with and with warnings
11 are extrinsically linked and are therefore pre-empted.

12 And referring to this book on Page 36 where it talks
13 about, "For example, the FTC, in promulgating its initial
14 trade regulation rule in 1964, criticized advertising that
15 associated cigarette smoking with such positive attributes as
16 contentment, glamour, romance, youth, happiness, at the same
17 time suggesting that smoking is an activity at least
18 consistent with physical health and well-being." That's pre-
19 empted. That's what he's asking this witness about. It's
20 pre-empted. He's not allowed to go into that.

21 MR. COOK: However, Your Honor, this is not pre-
22 empted.

23 MR. HEPLER: What are you showing?

24 THE COURT: He's showing you this.

1 MR. COOK: On the conspiracy to commit fraud. In
2 the State of Illinois you have a positive duty not to commit
3 a fraud under--

4 THE COURT: He keeps saying you haven't pled that.

5 MR. COOK: I have too. It's in my sixth amended
6 complaint.

7 MR. CRIST: There is no allegation in the complaint
8 of common law fraud.

9 MR. COOK: Why do you think that fraud means common
10 law fraud? There are all kinds of fraud, and there are all
11 kinds of conspiracies. And Illinois has a law that you're
12 charged with in the judge's section, which I have charged you
13 with also in your negligence section, that you are required
14 not to deceive people in terms of your advertisement. It's
15 Chapter 121 and a half, Section 362.

16 In addition to that-- I mean that's a fraud.

17 MR. CRIST: The only exception of Cipollone comes
18 out is common law fraud and conspiracy to commit common law
19 fraud. It doesn't deal with these lesser theories like using
20 athletes or celebrities in advertising and whether or not
21 that's appropriate. That is pre-empted. There is no common
22 law fraud claim in this case.

23 MR. COOK: Why do you keep saying common law? Why
24 don't you just say fraud? When I say fraud you say common

1 law because that's what you want me to plead. I haven't
2 pleaded it. I could have pleaded it.

3 But, Paul, it's just like saying I said derivative. What
4 I haven't pled don't talk about; talk about what I did plead.

5 MR. CRIST: What you have pled is pre-empted.
6 That's the point.

7 MR. COOK: No, it isn't pre-empted because you are
8 not allowed to deceive and distort people and distort
9 advertisements.

10 In addition to that, your cohort and created hatchet man
11 is not allowed to help you do that.

12 THE COURT: What was your last question?

13 MR. HEPLER: Your Honor, may I move to strike those
14 comments by Mr. Cook referring to hatchet man and cohort.

15 THE COURT: I think it's--

16 MR. COOK: Why?

17 THE COURT: When you draw these inferences at the
18 time of argument, we'll come up with, but I don't think it is
19 appropriate at this stage.

20 MR. COOK: I thought it was fairly mild.

21 THE COURT: Well, we're at the bench, and it was not
22 overheard by the jury. But I'm sustaining your objection.

23 Now, what was your last question?

24 MR. COOK: I don't know.

1 THE COURT: Because I mean we really jumped quick on
2 this one, and I'll tell you I'm working my way back to that
3 seemed like a little simpler question. What was it?

4 MR. CRIST: What the question was was whether or not
5 it would be appropriate to use, according to the language off
6 that exhibit, somebody engaged in above, whether it would be
7 appropriate to use somebody engaged in normal exercise or
8 activities.

9 MR. COOK: Well, that's absolutely appropriate
10 evidence, and the only way it could be pre-empted is if I was
11 talking in a period of time after 1969.

12 THE COURT: What period of time are you talking
13 about?

14 MR. COOK: I haven't framed it yet in terms of a
15 period of time.

16 MR. CRIST: That's the problem.

17 THE COURT: I agree.

18 MR. COOK: But pre-emption is not an evidentiary
19 doctrine. It is a pre-empting doctrine, and I can offer the
20 evidence. I mean if he wants to eliminate it, it doesn't
21 mean because I've asked something that it's wrong. He has to
22 say "Objection, Your Honor, to any comment after 1969", and
23 then you can instruct the jury if you want.

24 THE COURT: Is your question limited to prior to

1 1969?

2 MR. COOK: I didn't limit my question. I was asking
3 him about this as a generality. You're going to advise them
4 that anything after 1969 is pre-empted. I don't have to
5 advise them that.

6 THE COURT: I can ask you to qualify your question.

7 MR. COOK: Well sure you can, but then you make it
8 my responsibility rather than theirs or yours. I'm not
9 suppose to tell them as a matter of law.

10 THE COURT: If he objects that might be rather than
11 having to advise them. At least for the jury's benefit, I
12 would kind of like to know when you're talking about. I
13 think that will simplify it if anybody wants to make-- put a
14 time frame on the question.

15 MR. CRIST: The question as framed was improper--

16 MR. COOK: As you recall, I was talking about the
17 FTC ad.

18 THE COURT: I thought you were too. We jumped fast
19 on it, but time frame is important. I'll-- based on the
20 objection, I'm denying it in part and granting it in part.
21 And the part I'm granting is that we put a specific time
22 frame on this so the jury has some idea when we're talking
23 about it.

24 Okay. Let's let us get back.

1 (The following proceedings were had in the
2 presence of the jury.)

3 THE COURT: Okay. Now continue, Mr. Cook.

4 MR. COOK: Yes, sir.

5 Q. (Mr. Cook) Discussing what "and to retain-- and
6 to refrain from depicting smokers engaging in sports or other
7 activities requiring stamina or conditioning beyond those
8 required in normal recreation", sir, let me show you an
9 exhibit here somewhere. Would you include mountain climbing
10 in that type of activity?

11 MR. CRIST: Objection, Your Honor, pre-empted.

12 THE COURT: Are you-- Are we going to place a time
13 frame on which advertisement--

14 MR. COOK: I'm going to show him this exhibit,
15 Judge.

16 THE COURT: And what is the date on that, 1961. And
17 the exhibit number is?

18 MR. COOK: 124.

19 THE COURT: And the connection-- and the question is
20 in connection with that exhibit. The objection-- Go ahead.

21 MR. HEPLER: My objection is to materiality and
22 relevance, Your Honor.

23 THE COURT: Materiality and relevance. The
24 objections are overruled. Continue.

1 Q. (Mr. Cook) Do you think that, for example, that
2 mountain climbing is a activity requiring stamina or
3 conditioning beyond those required in normal recreation?

4 MR. CRIST: Objection, Your Honor, pre-empted.

5 THE COURT: We're still talking about a series of
6 questions of this exhibit he's made reference to from
7 December of 1961. I assume that's the time period that we're
8 working on. Overruled.

9 THE WITNESS: I think I know the question.

10 Mr. Cook, mountain climbing or-- is a lot of people have
11 recreation; climbing mountains, hiking, doing different
12 things. So, I mean I'm not sure-- is that-- in other words,
13 as I read that, I'm not sure that's not what we're-- what the
14 issue is.

15 Q. (Mr. Cook) So, you would think that an
16 advertisement such as is on Plaintiff's Exhibit No. 124 is
17 the 1961, December 19th Look Magazine article. It says, "If
18 Hitler Had Won World War II" on the front. That depicts a
19 Camel smoker in mountain climbing. You think that mountain
20 climbing is normal recreational activity.

21 MR. HEPLER: Show my objection to
22 mischaracterization of what the exhibit shows. I don't
23 believe it shows a smoker climbing a mountain.

24 THE COURT: You better look at it if you like.

1 MR. HEPLER: Or we can go from recollection or
2 whatever it was.

3 THE COURT: The objection is overruled. Go ahead,
4 it's overruled. Go ahead.

5 THE WITNESS: And where are we on the question? I
6 thought I answered the question. Are we--

7 THE COURT: I don't remember if you answered the
8 question or not to be honest with you.

9 Would you go back and look to see if there was an answer?

10 MR. HEPLER: I don't think there was, Your Honor.

11 MR. COOK: I thought there was. I thought you
12 objected after the answer. That's fine.

13 MR. HEPLER: We may have. I just hadn't seen that
14 exhibit in a week maybe.

15 THE COURT: Okay. Well, it looks like the witness
16 and Mr. Cook agree. The answer will stand. The objection is
17 overruled. Next question.

18 MR. COOK: What was the answer?

19 THE COURT: Okay. Let's stop, Jean, take your time,
20 go back and look.

21 THE REPORTER: He didn't answer it.

22 THE WITNESS: Could you repeat the question then,
23 please? I'm sorry.

24 THE COURT: Yeah, please repeat the question.

1 (The reporter read back the last question.)

2 THE WITNESS: Yes.

3 Q. (Mr. Cook) You don't think that mountain climbing
4 requires stamina or conditioning, unusual stamina or
5 conditioning?

6 A. They may have to be in better shape than I am, Mr.
7 Cook, but I think mountain climbing is a recreation for
8 people. It's not running the hundred yard dash in the
9 Olympics.

10 Q. It isn't going for a walk or riding a bicycle
11 either.

12 A. That's correct.

13 Q. As a matter of fact, this advertisement here says,
14 "Mountain rescue expert, Robert Burn, risks his life without
15 pay to save people in distress high in the mountains.
16 Mountain rescue expert." You don't think that that's-- you
17 just don't--

18 A. I'm sorry, your question was about mountain
19 climbing. I mean if you're talking about-- has this guy got
20 some expertise?

21 Q. Well, I assume if that guy's climbing mountains,
22 if he's rescuing them in the mountains.

23 A. It says he's an expert, so he obviously is an
24 expert.

1 Q. Well what about Plaintiff's Exhibit No. 53? You
2 have got a picture of John Wayne on the back of it. Do you
3 remember John?

4 A. Yes, sir.

5 Q. Do you remember when John was a chairman of the
6 American Cancer Society's fund raising drive in 1977?

7 A. I don't remember that, sir. No, sir.

8 Q. Do you remember when he hawked Camel cigarettes?

9 A. I don't remember that either.

10 Q. Would you agree that old John probably was a role
11 model in December or July the 12th, 1954?

12 A. He was certainly a celebrity, yes, sir.

13 Q. Particularly to people of your political
14 persuasion, hum?

15 MR. HEPLER: Your Honor, object, irrelevant.

16 THE COURT: Object, irrelevant, stricken. Continue.

17 Q. (Mr. Cook) I'm going to show you Plaintiff's
18 Exhibit No. 51. Do you remember old James Arness?

19 A. Yes, sir.

20 Q. Would you agree that he was kind of a role model
21 when he was on Gun Smoke during-- this is in 1958. You'd
22 agree that he was a very popular movie star at that period of
23 time?

24 A. He was a celebrity, yes, sir.

1 Q. Do you see any warning on this advertisement of
2 John Wayne's that cigarette smoking might be bad for your
3 health?

4 A. No, sir.

5 Q. Do you think that your company's-- that your
6 company knew in 1958 that cigarette smoking might cause
7 cancer?

8 MR. CRIST: Your Honor, I object to this. It was 31
9 years ago before he got to the company.

10 MR. HEPLER: Speculation.

11 MR. CRIST: The objection calls for speculation and
12 conclusions. It was 31 years before he got to the company.

13 MR. COOK: I can show him some of the company's
14 documents if you'd like to look at them.

15 MR. HEPLER: Objection, move that the comment be
16 stricken.

17 THE COURT: I'm going to sustain the objection as to
18 speculation. With regard to showing him the documents, make
19 whatever you choose to do, Mr. Cook. We'll see if there's an
20 objection.

21 Q. (Mr. Cook) Do you remember Joe DiMaggio?

22 A. Yes, sir.

23 Q. Mickey Mantle?

24 A. Yes, sir.

1 Q. Two centerfielders for the New York Yankees.

2 A. Yes, sir.

3 Q. I assume that you were a Cardinal fan.

4 A. You've got that right.

5 Q. Do you remember Howard Paulette?

6 A. Yes, sir.

7 Q. Do you remember the year that he won twenty games?

8 Did you know he advertised for Camel cigarettes?

9 A. No, sir, I didn't know that.

10 Q. Would you agree that when you and I were boys is
11 that Howard Paulette was a star with the St. Louis Cardinals?

12 A. Yes, sir, he was a celebrity, sports celebrity.

13 Q. That would be contrary using them to your code, is
14 that true?

15 A. That would be contrary to today's practices, yes,
16 sir.

17 Q. Do you think-- Why do you think, sir, and I
18 realize that 31 years ago that you didn't work for Camel
19 cigarettes, that you were about twelve years old when they
20 used that advertisement with John Wayne on it, why do you
21 think-- do you assume that they paid John Wayne money to do
22 that advertisement?

23 MR. CRIST: Objection to the form of the question.

24 THE COURT: Overruled. He can answer the question

1 based on his--

2 THE WITNESS: I would assume that, Mr. Cook.

3 Q. (Mr. Cook) Do you remember Alan Ladd?

4 A. Yes, sir.

5 Q. A very popular movie in that period of time,
6 Shane. Do you remember Shane?

7 A. Yes, sir.

8 Q. I still play it every now and then. You see the--
9 the-- Do you remember Maureen O'Hara and John Wayne from the
10 Quiet Man?

11 A. I don't remember that movie, but I remember
12 Maureen O'Hara.

13 Q. I will have you look at Plaintiff's Exhibit No.
14 64. You can see that Maureen was selling cigarette ads
15 during that period of time. Are those the type of ads that
16 you'd be concerned about, about impressionable young people
17 looking at and trying to emulate those movie stars, that they
18 may think that if they smoke that it might be a good thing
19 for them to smoke?

20 A. No, sir.

21 THE COURT: Okay. We're going to switch court
22 reporters, Mr. Cook.

23 * * * * *

24 (The following proceedings were reported by

1 Donna Brewer, Official Court Reporter,
2 Illinois CSR 084-002549, RPR.)

3
4 (The Cross Examination of Mr. Ogelsby under
5 Section 2-1102 by Mr. Cook continued as
6 follows.)

7 Q. (By Mr. Cook) I am going to hand you Plaintiff's
8 Exhibit No. 128, sir, and ask you to look at that Camel ad --

9 A. On the left, sir?

10 Q. -- on the back of that time magazine.

11 MR. CRIST: Could we see what it is, what is being
12 -- that is just a big book.

13 MR. COOK: I'm sorry.

14 THE WITNESS: Do you need this?

15 MR. COOK: Yes. If I can just barrow it from you
16 for a minute. I will identify the ad.

17 MR. HEPLER: Is there a number for this one, Mr.
18 Cook?

19 MR. COOK: It's 128. It's the April 20, 1953,
20 bearing the picture of Mr. Molotov from Russia on the cover
21 and showing some athletic figures on the back advertising
22 Camels.

23 Q. (By Mr. Cook) It shows most of those or at least a
24 large number of those athletic figures all smoking, does it

1 not?

2 A. Yes, sir.

3 Q. It has Mickey Mantle, Bob Lemon, Billy Cox, Billy
4 Goodman, Hank Sauer, Early Wynn, Jerry Staley -- you remember
5 Staley when he pitched for the Cardinals?

6 A. Yes, sir.

7 Q. He had that great -- they used to call it a drop
8 then. They don't call it that any more. They call it -- you
9 remember that?

10 A. Yes, sir.

11 Q. What do you think the significance is of why they
12 paid these athletes money to smoke cigarettes on the back of
13 a magazine?

14 MR. CRIST: Objection, your Honor. It calls for
15 speculation.

16 MR. HEPLER: Join, your Honor.

17 THE COURT: If he has an answer, he can give it.
18 It's overruled.

19 THE WITNESS: Mr. Cook, I assume that marketing
20 people back then used celebrities the same way they do today,
21 which is to try and break through the clutter of advertising
22 to appeal to the consumer. I don't know why they used these
23 particular people or this particular ad, but --

24 Q. (By Mr. Cook) If you used Mickey Mantle and Joe

1 DiMaggio and those people, you had about the best of it in
2 that period of time, isn't that true?

3 A. Good ball players, yes, sir.

4 Q. Well, also the national -- the NFL and the NBA were
5 in their infancy still as being nationally televised sports
6 is that --

7 A. Right.

8 Q. America -- baseball was America's pastime. Some
9 people might say it is now. But it was the only game in
10 town, wasn't it, in most places?

11 A. Yes, sir.

12 THE COURT: Sorry. I had to quiet them down. I
13 apologize.

14 MR. COOK: Who was it, the Chief Judge?

15 THE COURT: No.

16 Q. (By Mr. Cook) I am going to hand you Plaintiff's
17 Exhibit No. 188.

18 MR. CRIST: Do you have any extra copies?

19 MR. COOK: That's the only copy I have.

20 Q. (By Mr. Cook) While Mr. Crist is looking at that,
21 does the Tobacco Institute, to your knowledge, publish any
22 documents since you have been involved with the Tobacco
23 Institute or RJR Nabisco that accuses officials of Health,
24 Education and Welfare of misconduct?

1 A. No, sir.

2 Q. Of deceit?

3 A. No, sir.

4 Q. Of hoodwinking the public?

5 A. No, sir.

6 Q. Of committing hoaxes on the public?

7 A. Not that I am aware of.

8 Q. They don't publish anything for general publication
9 that is sent out and says that -- to the extent that there is
10 no proof that smoking does not cause shortened lives. There
11 is no -- you don't make publications like that?

12 A. I'm sorry, Mr. Cook. You have to help me with that
13 question.

14 Q. I will as soon as Mr. Crist is through with that
15 exhibit.

16 A. Okay.

17 Q. Since you have been there in 1989, there aren't any
18 publications that go out from the Tobacco Institute that
19 question the validity of the Surgeon General's reports?

20 A. Well, I don't see all of the documents that go out
21 of the Tobacco Institute.

22 Q. You haven't seen any like that?

23 A. I am not aware of any.

24 Q. You haven't seen any accusing Louis Sullivan, the

1 Secretary of Health, Education and -- of Health and Human
2 Services of deceit or lying or trumping up health charges?

3 A. You are talking about a document that has been sent
4 out?

5 Q. Yeah. You don't do that any more?

6 A. No, sir. I am --

7 Q. You don't know that you ever did that, do you?

8 A. I am not aware of any document since I have been
9 with the company.

10 Q. And that would though be since early 1989?

11 A. Yes, sir.

12 MR. CRIST: I'm sorry. I am listening with one ear
13 and reading with one eye.

14 MR. COOK: I am only going to use the first page of
15 that.

16 Q. (By Mr. Cook) I am going to hand you Plaintiff's
17 Exhibit No. 188 which is styled, The Cigarette Controversy,
18 An Examination of the Facts by the Tobacco Institute. It's
19 Version 24, April 23, 1968, final copy.

20 MR. COOK: And I would move the admission of this
21 document, your Honor, for the purposes of reading certain
22 admissions on pages -- on page 1.

23 THE COURT: Thank you. Does anyone for the defense
24 wish to comment?

1 MR. CRIST: Yes, your Honor. I would like to
2 object to what Mr. Cook -- page No. 1 on the basis of
3 relevance and materiality. I would also like, your Honor, to
4 be able to reserve objections to any of the rest of the
5 document since I haven't even had a chance to see it.

6 THE COURT: Okay.

7 MR. CRIST: And I would request, your Honor, that
8 if what Mr. Cook intends to read are the two portions that he
9 has bracketed in pink that for purposes of completeness he be
10 requested to read from the top of page 1 on down.

11 MR. HEPLER: May I see that?

12 THE COURT: Mr. Hepler. Would you like to add
13 anything, Mr. Hepler?

14 MR. HEPLER: No. I join in those objections, your
15 Honor.

16 THE COURT: Okay. The objection is granted in part
17 in that I am ruling just on this specific page at this time
18 until -- he hasn't had a chance to read the whole document.

19 MR. COOK: Who hasn't?

20 THE COURT: Mr. Crist. And since you are just
21 referring to the one page at this time, I am admitting that
22 into evidence. As we go through it, we'll just go through a
23 little bit, maybe piecemeal.

24 MR. COOK: Well, your Honor, I am only admitting

1 this for the limited purpose for these admissions. I am not
2 asking that the whole document be admitted.

3 THE COURT: Well, then your motion is granted.

4 MR. COOK: Good.

5 THE COURT: Proceed.

6 Q. (By Mr. Cook) I would like you to look at page 1 of
7 this document.

8 A. Thank you.

9 Q. The first question and answer is something to the
10 effect, "Has it been proved that smoking causes premature
11 death?" Can you see that, sir?

12 A. I am trying to read the contents if I am --

13 Q. Oh.

14 A. Okay. I'm sorry. The question was?

15 Q. The question was is that -- there is some question
16 and answers in that document published by the Tobacco
17 Institute in 1968. And the first question is that, as I see
18 it, is it said something to the effect -- and maybe I can
19 quote it exactly even though I just looked at it -- that,
20 "Has it been proved that smoking causes premature death?"
21 That's the question -- was I pretty close to it?

22 A. Yes, sir.

23 Q. And the answer was no?

24 A. Correct, with a reference to page 8.

1 Q. Right. Now, my question really doesn't have much
2 to do with that document. My question has to do -- do you
3 publish that type of stuff now with statements like that in
4 it?

5 MR. CRIST: Objection, your Honor, preemption.

6 MR. COOK: That's not preemption. It's not an
7 advertisement, your Honor. It's not promotion.

8 MR. HEPLER: Objection, materiality and relevance.

9 MR. CRIST: Your Honor --

10 THE COURT: Okay. Go ahead.

11 MR. CRIST: We do publish advertisements and they
12 do have the Surgeon General's warnings on them.

13 THE COURT: Right.

14 MR. CRIST: That was braced within that question.
15 It was preempted.

16 THE COURT: Okay. Any portion that might apply to
17 any promotional or advertising within the question is
18 sustained. It's my understanding you are asking outside that
19 area of inquiry.

20 Q. (By Mr. Cook) The Tobacco Institute doesn't
21 advertise, do they, sir? They don't advertise cigarette
22 products, do they?

23 MR. CRIST: Your Honor, I object to the question on
24 the basis of the ambiguity of the word you.

1 MR. COOK: Oh, I'm sorry.

2 THE COURT: The objection is sustained. Why don't
3 you pursue and see where we are going?

4 Q. (By Mr. Cook) Most of the publications -- I thought
5 it was clear, but maybe I will clear it up again. The
6 Tobacco Institute speaks for the tobacco industry on those
7 things that all of you companies are able to agree about.
8 The Tobacco Institute makes publications in those records, do
9 they not?

10 A. The Tobacco Institute, like most trade
11 associations, tries to deal with a lot of issues that impact
12 on the industry.

13 Q. Right. And --

14 MR. CRIST: Your Honor, I object. I don't think
15 the witness was finished with his answer.

16 THE COURT: Were you finished?

17 THE WITNESS: I am fine, Judge.

18 THE COURT: Okay. Next question.

19 MR. COOK: I mean I am trying to straighten this
20 out for you, Mr. Crist. And you --

21 MR. CRIST: Your Honor --

22 THE COURT: Sustained. That is stricken. Next
23 question.

24 Q. (By Mr. Cook) And you publish handouts on smoking,

1 environmental smoke issues?

2 A. Yes. They are publications from the Tobacco
3 Institute, yes, sir.

4 Q. Sure. And you publish things apparently about
5 children and smoking?

6 A. Yes, sir.

7 Q. And you publish -- we have talked about that a
8 little bit. You publish things about women and smoking?

9 A. I don't know all our publications.

10 Q. You haven't seen -- those are before your time,
11 too?

12 A. There are publications from the Tobacco Institute.

13 Q. And, generally speaking, if there is going to be a
14 publication on an issue that relates to tobacco and health,
15 it's the Tobacco Institute that makes that publication, isn't
16 that true? That's what the purpose is?

17 A. I don't know that I can agree with that Mr. Cook,
18 but I am not disagreeing with the fact that there are a lot
19 of publications.

20 Q. Okay. So -- and the publication that I just showed
21 you, that wasn't the publication of RJR Reynolds. That's the
22 publication of the Tobacco Institute.

23 A. It is a final draft of something for the Tobacco
24 Institute, that's correct.

1 Q. And in -- what my question was, do you publish that
2 type of statement now, that particular statement, that there
3 is no proof that cigarette smoking causes shortened lives?

4 MR. CRIST: Object to the form of the question on
5 the basis of the ambiguous use of the term you and object on
6 the basis of preemption.

7 THE COURT: Objection overruled. Continue.

8 THE WITNESS: Mr. Cook, I don't know of any, you
9 know, publications like this today. And your question was --
10 I'm sorry. Come --

11 Q. (By Mr. Cook) I think that we are getting -- this
12 is an issue that may have been addressed in 1968. But in the
13 smoking and health issues now, you don't particularly engage
14 the Surgeon General on the basic question about whether or
15 not cigarette smoking is harmful to health?

16 A. Well, I think certainly the public --

17 MR. CRIST: Object to the form of the question.

18 THE COURT: Overruled. Continue.

19 COURT REPORTER: I'm sorry?

20 THE COURT: Hold on.

21 MR. CRIST: I object to the form of the question.
22 He said overruled. And I said on the basis of preemption.

23 THE COURT: Overruled. The witness is now allowed
24 to answer.

1 THE WITNESS: And the question was, I'm sorry, so
2 that I am clear where we were?

3 THE COURT: Okay. Donna, would you look for the
4 question, please?

5 MR. COOK: I will re-ask it.

6 THE COURT: Go ahead, Mr. Cook.

7 Q. (By Mr. Cook) You are not aware of this in this
8 case, but I would ask you to assume that it's true, that the
9 jury has been exposed to numerous documents where the Tobacco
10 Institute has been critical of the Surgeon General of the
11 United States, of the American Cancer Society and people like
12 that, personal attacks on them, calling them Ayatollah,
13 deceptive, hoax, things like that. You don't do that any
14 more, do you?

15 A. Mr. --

16 Q. If you did it, then you don't do it any more?

17 A. Mr. Cook, I think even today the debate on a lot of
18 issues gets a little heated on both sides. And there may be
19 times when people use words or terms that might better not be
20 used. But what was your basic -- what was your question?

21 Q. Mine has to do with publication. I understand,
22 sir, that when people debate things that there can be a
23 heated debate. And you and I might get angry with you and I
24 might call the types of things that you publish dribble. I

1 might do that and I would be sorry about it because Judge
2 Donovan would probably lecture me for doing that.

3 A. Okay.

4 Q. However, publishing something means taking a
5 document and sending it out for people to read. And what I
6 suggest to you is that you no longer publish this type of
7 statement, "Has it been proved that smoking causes premature
8 death?" Answer, "No." You don't publish that type of thing
9 any more, do you?

10 A. Well, I don't think we publish this type of
11 document. We may make statements as it relates to trying to
12 clarify our position on the smoking and health controversy or
13 trying to respond to some attacks. But I am not aware of us
14 publishing anything like this, sir.

15 MR. COOK: Would you mark this, please?

16 THE COURT: The court reporters aren't in tune with
17 the numbering. Do you have a number we have not used?

18 MR. COOK: 305.

19 THE COURT: 305.

20 MR. COOK: And 306.

21 MR. CRIST: Your Honor, I believe those numbers
22 were used.

23 THE COURT: Mr. Crist, could you make a suggestion
24 on a number then by your chart?

1 MR. CRIST: I think that the last one in the 300
2 series that we used was 308.

3 THE COURT: Okay. This will be 309, Donna.

4 (People's Exhibit Nos. 309, 310 and 311 were
5 marked for identification.)

6 THE COURT: Is everybody comfortable still?
7 Anybody have to go to the bathroom or anything? Okay.
8 Let's take about five minutes.

9 (At this time a short recess was taken.)

10 THE COURT: Please proceed.

11 Q. (By Mr. Cook) Mr. Ogelsby, I marked some other
12 publications by the Tobacco Institute. But just for the time
13 being, I want you to assume that in the 60's, in the 70's and
14 the early 80's that the Tobacco Institute made publications,
15 handouts such as documents -- not necessarily these, but the
16 documents like these that I am holding up, No. 311, The
17 Cigarette Controversy, Eight Questions and Answers, The
18 Cigarette -- 310, The Cigarette Controversy. You can see
19 TI's logo on the back of it. The Cigarette Controversy,
20 1974. This one is '71. This one is '70. September, 1979,
21 Women and Smoking. They hand out documents during that
22 period of time, 60's, 70's, and early 80's before you got
23 there. Many of the documents took issue with what the
24 Surgeon General has said that there is a causal connection

1 between smoking and health. Can you assume that?

2 A. Okay.

3 Q. All right. Now, do you still -- I believe I have
4 asked you this. You don't publish documents any longer that
5 say that there is no causal connection between cigarette
6 smoking and cancer that has been proved?

7 MR. CRIST: Objection, your Honor.

8 Q. (By Mr. Cook) Or do you?

9 MR. CRIST: Asked and answered.

10 MR. COOK: If you can tell me the answer, then that
11 would be fine with me.

12 MR. CRIST: The answer was he said that he is not
13 aware of any documents that have been published to that
14 effect since his tenure of the Tobacco Institute in 1989.

15 MR. COOK: I believe that you are right.

16 THE COURT: Next question. Thank you, Mr. Crist.

17 Q. (By Mr. Cook) Now, the reason -- can you think of a
18 reason for publishing statements before that took issue with
19 the Surgeon General's conclusions on smoking and health?

20 MR. CRIST: Objection, your Honor. Calls for
21 speculation.

22 MR. HEPLER: Join in that, plus -- yes.

23 MR. COOK: I haven't finished the question.

24 THE COURT: Please complete the question.

1 Q. (By Mr. Cook) Other than to cause your customers,
2 smokers, not to believe what the Surgeon General said was
3 true --

4 MR. CRIST: Objection, your Honor. Calls for
5 speculation.

6 MR. HEPLER: Objection to the form also, your
7 Honor.

8 THE COURT: I would ask you to repeat the full
9 question. And let him finish the full sentence so I can hear
10 it. Go ahead.

11 Q. (By Mr. Cook) I want you to assume that during the
12 60's, 70's and 80's that the Tobacco Institute published
13 things that said how -- like talking about some of the
14 Surgeon General's statistics, how the most frightening
15 statistic about smoking came to be invented --

16 THE COURT: What is that exhibit number you just
17 pointed to?

18 MR. COOK: That exhibit number is Plaintiff's
19 Exhibit No. 11, your Honor.

20 THE COURT: Go ahead.

21 Q. (By Mr. Cook) And took issue with the Surgeon
22 General in harsh language on whether or not there was a
23 causal connection proved between smoking and cancer. You can
24 assume that, can't you?

1 MR. CRIST: Your Honor, I object to the form of the
2 question. Plaintiff's Exhibit 11 is precisely what the 1964
3 Surgeon General's report itself said. He is asking him --
4 they are both consistent and inconsistent. The question
5 doesn't make any sense.

6 MR. COOK: I thought it made sense. But maybe it
7 didn't.

8 THE COURT: I don't think we got to even a question
9 part of it yet.

10 MR. COOK: I was just asking him if he could assume
11 that they made publications that questioned the Surgeon
12 General's findings on causation between cigarette smoking and
13 health.

14 THE COURT: Okay. Assume -- now, finish -- go
15 ahead.

16 MR. COOK: That's it.

17 THE COURT: Assume that. That's the question?

18 MR. COOK: I am asking him if he can assume that.

19 THE COURT: Yes or no?

20 MR. COOK: And he has not been allowed to answer
21 because Mr. Crist objects.

22 MR. CRIST: Your Honor, that was not the question
23 that was on the table. The question which was on the table
24 had reference to Plaintiff's Exhibit 11 as somehow being

1 inconsistent with what the Surgeon General's report said and
2 it's not.

3 THE COURT: He has modified the question. If, in
4 fact, that is what it originally was, it is something
5 different now. And the objection is overruled and he is
6 allowed to answer.

7 THE WITNESS: I don't know, Mr. Cook. Was the
8 question can I assume?

9 Q. (By Mr. Cook) Yes.

10 A. Or would I assume? I mean can I assume for you to
11 ask a question or --

12 Q. I am just asking you to assume that that fact is
13 true. That's why I showed you --

14 A. That's why I didn't think it was a question. I'm
15 sorry.

16 Q. I will show you some different ones. A statement
17 by Kornegay, Plaintiff's 11 -- Exhibit 11G, "Fair means
18 telling it like it is. It does not mean talking any more
19 about three hundred or three hundred twenty-five excess
20 deaths every year due to smoking. That number was invented
21 more than a dozen years ago by a former advertising
22 executive." Now, that's not very complimentary to the
23 Surgeon General's report, is it?

24 A. I understand --

1 MR. CRIST: I object. The number does not come out
2 of the Surgeon General's report. That's the point. He is
3 trying to link inconsistent concepts here.

4 THE COURT: Okay. The objection is overruled. He
5 did answer the question, I believe. That answer will stand.
6 Continue with your next area of inquiry.

7 Q. (By Mr. Cook) Now, sir, just assuming that for a
8 second that the Tobacco Institute took issue with the Surgeon
9 General on that issue and on whether or not the relationship
10 between lung cancer and smoking had been proved, is there any
11 other reason that you can think of that the Tobacco Institute
12 would make such assertions other than they did not want their
13 customers to believe what the Surgeon General said was true?

14 A. I don't think that's --

15 MR. CRIST: Object to the form of the question.
16 Object also because it calls for speculation.

17 MR. HEPLER: Also show my objection. The Tobacco
18 Institute -- to the form of the question. The Tobacco
19 Institute does not have customers.

20 THE COURT: Okay. With the limitation of Mr. -- on
21 Mr. Hepler's comment, the objection is overruled. You can
22 answer the question if you have one, sir.

23 THE WITNESS: I think I started to say that, you
24 know, I can understand why the industry -- there was a lot of

1 controversy surrounding this issue, a lot of different
2 information that was out there, a lot of different questions,
3 a lot of different figures. And I think the industry has
4 historically been in a position of having to respond to --
5 whether they are numbers or distortions or questions about
6 the industry's position. I think the industry has had to
7 respond to that.

8 Q. (By Mr. Cook) I didn't, sir -- I didn't mean to
9 suggest --

10 A. You asked why would they do that.

11 Q. No.

12 A. I was trying --

13 Q. Here. The Surgeon General-- we have had charts up
14 here and everything like that. And I don't guess we really
15 need to go into this with you, but I am curious about it.
16 The American Cancer Society, the National Institute of
17 Health, the Surgeon General of the United States, the
18 American Lung Association, the American Medical Association
19 all say -- and you know that they say that it is a proven
20 fact that cigarette smoking causes lung cancer. You know
21 they say that, don't you?

22 A. Yes, sir.

23 Q. All right. Now, your industry takes issue with
24 them on that fact, don't they?

1 A. Absolutely, yes, sir.

2 Q. And you still do. That's the whole point.

3 A. Absolutely.

4 Q. And the only reason why you would publish it is so
5 that people who smoke would not believe what the Surgeon
6 General says.

7 A. Not at all, Mr. Cook.

8 Q. You want them to believe what the Surgeon General
9 says?

10 A. I think we respond because our position has been
11 distorted and we need to clarify it.

12 Q. It isn't a question of your position, sir. It's a
13 question of the fact that the Surgeon General of the United
14 States says cigarette smoking causes lung cancer, doesn't he?

15 A. It's on the packs that we sell.

16 Q. I didn't ask you that, did I?

17 A. Well, it's the Surgeon General's warning. And
18 that's -- I'm sorry. I was just --

19 Q. It isn't your warning, is it?

20 A. That's correct.

21 MR. CRIST: Your Honor, objection, preemption.

22 MR. HEPLER: Objection.

23 MR. COOK: Your Honor, he brought it up.

24 MR. CRIST: Your Honor --

1 THE COURT: It's sustained. We are not going to go
2 in this area because of opening or not opening doors. Let's
3 go to another question and let's continue.

4 Q. (By Mr. Cook) The Surgeon General of the United
5 States, sir, says that cigarette smoking -- and indeed all of
6 them since 1964 have said that cigarette smoking is causally
7 connected with lung cancer, have they not?

8 A. I don't know how they describe it. But in laymen's
9 terms, yes, sir. That's --

10 Q. All right. And you make publications -- the
11 Tobacco Institute makes publications that says not so, right?

12 MR. CRIST: Objection, your Honor. Asked and
13 answered.

14 THE COURT: Overruled. Continued.

15 Q. (By Mr. Cook) And you want your customers to read
16 that, don't you?

17 MR. HEPLER: Again, show my objection. One, asked
18 and answered. Two --

19 COURT REPORTER: I'm sorry?

20 MR. HEPLER: Two, the Tobacco Institute does not
21 have customers if that is who he is asking in that --

22 MR. COOK: I will rephrase the question.

23 THE COURT: That's a correct statement, Mr. Hepler.
24 It's sustained. Rephrase it.

1 Q. (By Mr. Cook) All right. You want the industry's
2 customers, smokers, to read what you print, don't you?

3 MR. CRIST: Objection, your Honor. Asked and
4 answered.

5 THE COURT: Overruled.

6 THE WITNESS: I'm sorry. The question -- we want
7 -- you want -- I'm sorry.

8 Q. (By Mr. Cook) Okay. Now, it seem to me to be
9 fairly simple. Your industry, the industry that you speak
10 for that you represent --

11 A. Yes, sir.

12 Q. They say -- Mr. Johnston, the tobacco boss of yours
13 says, that smokers are the people that we work for.

14 A. Okay.

15 Q. All right. Now, when you make publications like
16 these, you want them to go to people so that they are able to
17 make informed decisions on whether or not they should smoke?

18 MR. CRIST: Objection, your Honor. He just
19 testified two minutes ago he is not familiar with any
20 publications which have been made by the Tobacco Institute
21 during his tenure.

22 MR. HEPLER: Asked and answered.

23 THE COURT: Okay. I think he should -- I am going
24 to overrule it. I think he should be allowed to answer this

1 inquiry. Now, did you complete your question?

2 MR. COOK: Yes, sir.

3 THE WITNESS: I'm sorry, Mr. Cook. Where were we?

4 Q. (By Mr. Cook) I don't think this is so tough.

5 A. I understand.

6 Q. But apparently it's hard. The Surgeon General, the
7 National Institute of Health, the American Lung Association,
8 the American Cancer Society, the American Medical
9 Association, the World Health Organization all say that the
10 causal connection between lung cancer and cigarette smoking
11 has been proven, do they not?

12 MR. CRIST: Objection. Asked and answered.

13 THE COURT: All right. He can answer this
14 question.

15 THE WITNESS: I believe that's correct, Mr. Cook.

16 Q. (By Mr. Cook) All right. Now, you make
17 publications to people that say, "No, it has not been proven,"
18 don't you?

19 A. That is the position. Yes, that's the position in
20 the industry.

21 Q. Okay. Now, my point is you have all of these
22 people, all of these voluntary health organizations and
23 public organizations saying that the relationship is
24 established and then you make a publication saying, "No, it's

1 not." Now, there can be only one reason for you to publicize
2 that. And that's so people don't necessarily believe what
3 the Surgeon General says is true, isn't that correct?

4 A. No, I don't agree with that, Mr. Cook.

5 Q. It's so the people believe what he says is true?

6 A. I think it's to clarify the industry position.
7 Usually it has been distorted. Usually the industry is in a
8 mode of having to respond. You know, they have to show that
9 they have a basis --

10 Q. Well, what is the industry's position? What should
11 Charlie Kueper think?

12 MR. CRIST: Your Honor, I object.

13 Q. (By Mr. Cook) Should Charlie Kueper think --

14 MR. HEPLER: Your Honor, I object to Mr. Cook's
15 conduct and I ask that it stop being argumentative format
16 with these theatrics.

17 MR. CRIST: I also ask that the witness be
18 permitted to complete his answer before Mr. Cook goes into
19 his theatrics.

20 THE COURT: Rephrase your last question, Mr. Cook.

21 Q. (By Mr. Cook) All right. I am sitting by Charlie
22 Kueper. You don't know Charlie. What should Charlie Kueper
23 think? Should he believe the Surgeon General or should he
24 believe you?

1 A. I don't know what any individual should believe.
2 What someone believes is up to them. But all smokers are
3 certainly aware of the serious health risk associated with
4 smoking.

5 Q. I didn't ask you that, did I?

6 A. I am trying to respond to the question.

7 THE COURT: He is allowed to give the complete
8 answer. Go to your next question.

9 Q. (By Mr. Cook) Now, sir, why do you want Charlie to
10 know -- why do you want Charlie to know the relationship is
11 not proved. You want him to know that, don't you?

12 A. Mr. Cook, as I said earlier, I think the industry
13 has had to respond to distortions, respond to attacks. Its
14 position has not been always stated correctly. It's
15 important to our investors. You know, it's important that we
16 have -- show that we have a scientific basis for our
17 positions. I think that's important.

18 Q. You don't go out and accuse the Surgeon General of
19 committing hoaxes because you want Charlie to believe what
20 the Surgeon General says is true, do you?

21 A. Well --

22 MR. CRIST: Objection, your Honor. Relevance and
23 materiality.

24 THE COURT: Same objection?

1 MR. HEPLER: Yes.

2 MR. CRIST: Assumes facts not in evidence.

3 MR. HEPLER: In addition, it's vague, your Honor,
4 dealing with a broad spectrum versus a narrow point of that
5 particular publication.

6 THE COURT: I believe he has been asked this
7 question several times.

8 MR. HEPLER: Asked and answered.

9 THE COURT: Sustained.

10 Q. (By Mr. Cook) So the only reason that you tell
11 everybody this information then, since it has been asked and
12 answered, is you just don't want people distorting what your
13 position is?

14 A. Well, usually it's to clarify what our position is
15 because people have distorted it.

16 Q. Okay. Now, what position are we talking about?

17 A. The position you were raising, the question of
18 smoking --

19 Q. And that's the position about whether or not
20 cigarette smoking causes lung cancer?

21 A. Correct.

22 Q. All right. Now, I didn't ask you about what your
23 position was. I said that all of these other people had the
24 position that is caused that -- that it is caused by lung

1 cancer. And then you want to clarify that, that because you
2 think that when the Surgeon General says that lung cancer is
3 caused by cigarette smoking, he is distorting your position?

4 MR. CRIST: Objection, your Honor. That's a
5 mischaracterization of the witness' entire testimony. Mr.
6 Cook is trying to summarize.

7 THE COURT: I think he has answered this question
8 several times, Mr. Cook. I know you are restating it, but I
9 am going to sustain the objection.

10 Q. (By Mr. Cook) How much do you get paid for your
11 job, sir?

12 A. My salary is \$285,000 a year.

13 Q. And you have stock options and things like that?

14 A. We had an opportunity to purchase stock.

15 Q. What is your total package from Reynolds?

16 A. I get a bonus. I probably will make four hundred
17 fifty -- five hundred thousand dollars a year.

18 Q. Now, you worked for the Energy and Commerce
19 Commission, sir -- I mean Energy and Commerce Committee?

20 A. I did, sir. Yes, sir.

21 Q. And who is the Chairman of that committee, sir?

22 A. John Dingle.

23 Q. Does that have anything to do with smoking and
24 health?

1 A. The Energy and Commerce Committee, yes, has
2 something to do -- we discussed that earlier. Yes, sir.

3 Q. Does it have to do with labeling and things like
4 that?

5 A. Yes, sir.

6 MR. CRIST: Your Honor, I object. Preempted..

7 THE COURT: At this point I don't think we are into
8 a point of preemption. I am -- overruled. You can continue
9 -- we will follow the next question or where we are going.
10 Continue, Mr. Cook.

11 Q. (By Mr. Cook) Sir, what is honoraria?

12 MR. CRIST: Your Honor, we have a continuing
13 objection in this area as well.

14 THE COURT: Yes, sir, you do. The previous grounds
15 are restated for the record.

16 MR. HEPLER: Does that also apply me, your Honor?

17 THE COURT: Applies across the board to all three
18 defendants.

19 MR. HEPLER: Thank you, your Honor.

20 THE WITNESS: And I can answer the question?

21 THE COURT: Definition of -- yes, what he asked
22 you.

23 THE WITNESS: Honoraria are monies given to people
24 for making speeches to colleges, to business groups, to union

1 groups usually to compensate them for the inconvenience of
2 getting into their schedule to come speak to the group.

3 Q. (By Mr. Cook) Sir, we have had some testimony
4 earlier that the Tobacco Institute gives honoraria to
5 Congressmen from time to time.

6 A. Yes, sir.

7 Q. That would not be one of the functions that you do
8 with the Tobacco Institute?

9 A. No.

10 Q. Do you -- does RJR give honoraria from time to
11 time?

12 A. We have, yes, sir.

13 Q. All right. I am going to hand you, for example,
14 Defendant's Exhibit No. 17 and ask you --

15 MR. HEPLER: May we --

16 MR. CRIST: Your Honor, could we approach real
17 quickly on this?

18 (The following proceedings were held at the
19 bench out of the hearing of the jury.)

20 THE COURT: Here is the exhibit, Defendant's
21 Exhibit 17. And Mr. Crist has brought to the attention of
22 the Court --

23 MR. HEPLER: Your voice carries very well.

24 THE COURT: Okay. There is a motion in limine with

1 regards to part of this that we are all aware of.

2 MR. CRIST: Order in limine.

3 THE COURT: Limine. What did I say?

4 MR. CRIST: Motion.

5 THE COURT: Order in limine.

6 MR. HEPLER: And that was marked in an offer of
7 proof and shouldn't be indicated as a Defendant's Exhibit in
8 this case because we haven't marked it in this case other
9 than in his offer of proof.

10 THE COURT: We can re-mark it right now then and
11 give it a Plaintiff's Exhibit.

12 MR. COOK: I have already identified it in front of
13 the jury. You would just be drawing attention to it. I am
14 through with it. I am going to hand it to him.

15 MR. HEPLER: The other thing I want to say is this
16 morning Mr. Cook made reference to Ways & Means which, I
17 think, everyone knows is Representative Rostenkowski. And
18 that's the backhand way of doing it, exactly what he is not
19 permitted to do. And I ask that he not identify this is a
20 document dealing with the Ways & Means because --

21 THE COURT: You have got a lot more faith than me
22 in what the jury knows about who their representatives are or
23 are not.

24 MR. HEPLER: He is getting a lot of publicity

1 currently.

2 THE COURT: Go ahead. Noted, but overruled.

3 (The following proceedings were held in open
4 court in the presence and hearing of the
5 jury.)

6 THE COURT: It's also 4:26. We are shooting for
7 the 4:30 mark if you can just keep that in the back of your
8 head.

9 MR. COOK: I will try and speed it up, Judge.

10 Q. (By Mr. Cook) Did you attended the affair at
11 LaQuinta in 1990, did you not?

12 A. I am sure I did, yes, sir.

13 Q. Are you aware of the fact that if Congressmen come
14 there that they are given an honoraria of \$2,000 a -- per
15 attendee?

16 A. I am not aware of the amount. I know that they get
17 honoraria.

18 Q. From time to time, does RJR Nabisco give honoraria
19 to Congressmen who speak to them?

20 A. Yes, sir.

21 Q. And that exhibit that I have just showed you is the
22 report of honoraria by the Chairman of the House Ways & Means
23 Committee, is that correct?

24 MR. CRIST: Your Honor --

1 THE WITNESS: That's what the document says.

2 MR. CRIST: Your Honor, we have not had an
3 opportunity to -- we have not had an opportunity to admonish
4 the witness on this particular issue. And I am concerned
5 about it coming out.

6 THE COURT: Okay. Hang on one second. Mr. Cook,
7 come up for just one second. He has made a good point here.

8 (At this time a discussion was held at the
9 bench out of the hearing of the jury and of
10 the record.)

11 THE COURT: Lead him.

12 Q. (By Mr. Cook) And, sir, the Judge asked me please
13 lead you. RJR Nabisco in Washington D.C. gave a contribution
14 of \$7,500 for honoraria to the Chairman of the House Ways &
15 Means Committee?

16 A. Well, this document --

17 Q. I prefer to leave him unnamed, but --

18 A. Right. I understand. This document indicates that
19 it was paid to a charity. But that's what the document
20 indicates, yes, sir.

21 Q. And how long did he speak to you for?

22 A. I don't know what this specific event is in '90. I
23 am having a little trouble with the exact date. But I don't
24 know what that event was, Mr. Cook.

1 Q. Sir, I am going to hand you Plaintiff's Exhibit
2 300A -- I guess I can do this just with the exhibit itself
3 rather than with him.

4 MR. COOK: How are we doing on time, Judge?

5 THE COURT: We are done. Are you done?

6 MR. COOK: (Indicating yes.)

7 THE COURT: Okay. Do you want to indicate at this
8 time whether you are going to have any examination, if the
9 witness should come back in the morning or --

10 MR. CRIST: As I understand it, Mr. Cook is finish
11 with Mr. Ogelsby?

12 THE COURT: He has finished his cross examination
13 under 2-1102.

14 MR. CRIST: Okay. Your Honor, what I would like to
15 do is I would like to have the opportunity to caucus, if we
16 could.

17 THE COURT: Sure.

18 MR. CRIST: We'll come back tomorrow morning with
19 the witness if we are going to use him and without him if we
20 are not for clarification if that is acceptable.

21 THE COURT: That's acceptable.

22 MR. CRIST: Thank you, your Honor.

23 THE COURT: Okay. Thank you. Let's see. We don't
24 have anything tomorrow. Nobody has events or anything which

1 is good. Okay. The 9:00 thing didn't work out so good
2 because we didn't start until 9:30, but I hate to wait until
3 9:30. So, we are going to try 9:15 in the morning, 9:15.
4 We'll see if we can start right at 9:15 when you all get
5 here. Okay? So let's shoot for that. Don't discuss the
6 case with anybody. We'll see you in the morning. Thank you
7 for your time.

8 MR. CRIST: Your Honor, can I also ask the jury be
9 admonished with respect to avoiding any media which relate in
10 any way to this case or to the issues in this litigation?

11 THE COURT: Okay. Everybody is aware as we have
12 gone to it each break is that no media, written, electronic,
13 anything of nature. Don't discuss it with anybody at home,
14 any friends, anybody. Don't even discuss it with each other
15 until all the evidence in the case is complete. If any
16 violations, intentional or unintentional, occur in this area,
17 please notify me immediately. Have a nice evening.

18 (The following proceedings were held out of
19 the presence and hearing of the jury.)

20 MR. COOK: Your Honor, I have two witnesses who I
21 expected to call with respect to advertisement and promotion
22 during the 1980's. Previous to your entry into the case,
23 Judge LeChien had ruled that while advertising and promotion
24 might very well be preempted in terms of being evidence of a

1 cause of action that advertising and promotion -- for
2 example, as you will recall, I was -- when Mr. Crist
3 objected, I was asking the witness, Ogelsby, about normal
4 activities and why they advertise people doing certain things
5 at certain times and certain strenuous -- so forth. You
6 recall that?

7 THE COURT: (Indicating yes.)

8 MR. COOK: My client -- they have raised the
9 defense of contributory fault in this matter. And I think
10 that the advertisements that they make, billboards,
11 advertisements -- Charlie is a Winston Cup fan. He is a
12 racing fan. As a matter of fact, his favorite racing man is
13 Bill Elliott who is right here on the corner of this exhibit.
14 And NASCAR -- and they advertise this to promote and sell
15 their product. And it may very well be preempted for a cause
16 of action.

17 But Judge LeChien had ruled that it was not
18 preempted with respect to what effect that it may have had on
19 Charlie on his decision about whether he should quit smoking
20 or not, which is clearly an issue in the case. If you are
21 going to keep all of that evidence out, as it seemed to me
22 that you are ruling in the -- when I was questioning Ogelsby
23 about that, then the two witnesses I have lined up to testify
24 about that are Mr. Iaca, who is the Vice President in charge

1 of advertising, and Mr. Ford, who is the Vice President in
2 charge of marketing and where the promotions are done, then I
3 will let them go. I don't want them -- what I am making is
4 kind of an offer of proof here in asking for an advisory
5 ruling about your position so that these gentlemen, if I'm
6 not going to call them -- I mean this is the essence of their
7 testimony. That's what they do. I don't want to further --

8 THE COURT: But you -- you would, to defeat their
9 claim of contributory negligence, argue that these were
10 insufficient admonishments in the ad?

11 MR. COOK: No. I would argue that the
12 advertisements encouraged him to smoke. It has nothing to do
13 with warnings at all. The purpose for the advertisement and
14 the purpose for the promotion has nothing to do with
15 defeating or diminishing the warning. What it has to do with
16 is encouraging him to smoke, which is not preempted under --
17 and in my negligence count, that it's contained there. The
18 only thing that is preempted is warnings. I thought the
19 reason that you kept out the advertisement because -- is that
20 there are several things in that very complex decision. It
21 says any evidence with respect to promotion and advertising
22 which would attempt to say that it neutralized the warnings
23 is not admissible. And I really don't know -- does that mean
24 that these type of things cannot come in to prove, not the

1 cause of action, but their effect on Charlie?

2 THE COURT: I feel an obligation to look at where
3 Judge LeChien made this ruling in the transcript. This was
4 prior to the course of trial and --

5 MR. CRIST: Let me make a couple of observations if
6 I can, your Honor.

7 THE COURT: Yes.

8 MR. CRIST: First, I don't remember that ruling.
9 Secondly, Mr. Ford handles sales which is getting --

10 MR. COOK: It was in the motion in limine.

11 MR. CRIST: -- which is getting stuff into the
12 field. Okay? It's the downstream. I mean he doesn't have
13 advertising or marketing responsibility. So he can't really
14 talk about those kind of issues at all. I mean for Bruce's
15 clarification, he is not in that side of it. Mr. Iaca is
16 advertising and marketing. I mean he gets those into the
17 field, Bruce, but he doesn't make decisions about them or
18 anything like that. That's on Iaca's side.

19 MR. COOK: Well, then if the Judge has to wait on
20 it, why don't I -- based on that representation, why don't we
21 cut Ford loose?

22 THE COURT: Okay.

23 MR. COOK: And Iaca looks like a man about town.
24 He probably really enjoys Belleville.

1 THE COURT: Well, right now half a loaf is better
2 than none. Let me try to find -- Mr. Cook feels that in the
3 transcript this is accounted for and you indicate it wasn't
4 the ruling of Judge LeChien.

5 MR. CRIST: I remember no such ruling, your Honor.
6 But I think -- I can't conceive that these things were
7 admissible for the purpose Mr. Cook suggests that they are
8 admissible for.

9 THE COURT: Okay. I am going to reserve ruling on
10 your offer of proof then. You can send Ford home.

11 MR. CRIST: Okay. Your Honor, there is one issue,
12 however, with respect to Mr. Ford. And that is that -- and
13 it may not be a problem at all. But I just don't want to get
14 into an authentication problem with respect to a letter which
15 he wrote to the field sales force after the McMahon letter.
16 I take it you are not going to complain about that, Bruce?

17 MR. COOK: I am going to complain about it being
18 hearsay.

19 THE COURT: You lost me on that one. What is that
20 again?

21 MR. CRIST: Well, there is -- your Honor--

22 MR. COOK: I mean I am going -- if you are going to
23 offer evidence of what he wrote, I am going to cross examine
24 him on it. You are exactly right about that. Now --

1 MR. CRIST: Okay.

2 MR. COOK: -- things are admissible --

3 MR. CRIST: If we can't otherwise get it in, we may
4 have to bring him back in our case then.

5 THE COURT: Ford?

6 MR. CRIST: Yes. Remember that letter? I don't
7 remember what exhibit it was, but something about they are
8 trying to send me information about --

9 MR. COOK: Children smoking.

10 MR. CRIST: No. Send me information about stores
11 which are located near high schools and colleges. Mr. Ford
12 is the one who countermanded that order and, I think, the
13 person who issued or at least directed that there be issued
14 reprimands to Mr. McMahon on it. So --

15 THE COURT: I think you might well have to bring
16 him back, sure. But it would be better to get him home for a
17 few days.

18 MR. COOK: I wasn't going to ask him anything about
19 it anyway when I put him on, Paul. Because you are going to
20 have to put him on directly on that.

21 MR. CRIST: Okay.

22 MR. COOK: If you will notice --

23 MR. CRIST: If we can get by the authentication
24 problem, I mean -- we are just going to draw this thing out

1 unnecessarily.

2 MR. COOK: Well, it isn't the question of
3 authentication, Paul. You can't -- that I am going to cross
4 examine him on that if you put him up there. I am going to
5 cross examine him about that they didn't do anything about it
6 until the Secretary of Health and Human Services knew about
7 it. You would be better off leaving that alone. But that's
8 your choice.

9 THE COURT: That's right. It's your choice, Mr.
10 Crist. And we'll leave it --

11 MR. CRIST: We'll send him home for now. His 237
12 is withdrawn.

13 THE COURT: Thank you. See you in the morning.

14 MR. CRIST: We are here at 8:30?

15 THE COURT: 8:30.

16 (At this time Court adjourned as to this
17 matter to reconvene at 8:30 a.m. on December
18 16, 1992.)

19 * * * * *